Office-Supreme Court, U.S.
FILED
FEB 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1448

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States may be collaterally estopped from litigating a question of statutory interpretation of public importance governing the relationship between a federal agency and members of a large class of businesses subject to the agency's jurisdiction by the judgment of the court of appeals for a different circuit rendered in another case involving the same private party but arising from a separate transaction at a different location.

2. Whether a contractor retained by the Environmental Protection Agency specifically for the purpose qualifies as an "authorized representative" of EPA's Administrator entitled to participate in agency inspections of stationary emission sources pursuant to Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7414(a)(2).

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STAUFFER CHEMICAL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-41a) is reported at 684 F.2d 1174. The court of appeals' order upon denial of a petition for rehearing (App. B, *infra*, 42a-43a) is unreported. The opinion of the district court (App. C, *infra*, 44a-56a) is reported at 511 F. Supp. 744.

JURISDICTION

The judgment of the court of appeals (App. D, *infra*, 57a-58a) was entered on July 7, 1982, and a timely petition for rehearing was denied (App. B, *infra*, 42a-43a) on October 15, 1982. On January 3, 1983, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 114(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7414(a) provides in pertinent part:

> (2) the Administrator or his authorized representative, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person, or in which any records required to be maintained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

STATEMENT

1. This case arises from respondent's challenge to use of a contractor duly designated as a representative of the United States Environmental Protection Agency to assist EPA employees in conducting an inspection of a stationary emission source under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp IV) 7414(a)(2). EPA contracted with PEDCo Environmental, Inc. to assist with technical aspects of an overview inspection of an elemental phosphorus production plant operated by respondent located in Mt. Pleasant, Tennessee.[1] EPA

[1] The Clean Air Act, 42 U.S.C. (Supp. IV) 7401 *et seq.*, establishes a dual state-federal system of air pollution enforcement. EPA establishes national ambient air quality standards, 42 U.S.C. (Supp. IV) 7409, while the states are primarily responsible for enforcing these standards, subject to EPA's supervision and approval, 42 U.S.C. (Supp. IV) 7407, 7410 and 7412. As part of that oversight EPA employs its Section 114(a)(2) inspection authority to conduct an "overview inspection program" under which it inspects approximately 10% of the major stationary sources of air pollution within each state annually. The sources so inspected already have been inspected by state authorities, which submit reports to the EPA. The results of each overview inspection are compared with the previously-reported results of the state inspection of the same facility. The purpose of the overview inspections is to evaluate each state's performance in enforcing the Clean Air Act.

took steps necessary to ensure that information learned by employees of its inspection contractors during inspections was kept confidential. Thus, the terms of EPA's contract with PEDCo hold PEDCo and its employees to strict confidentiality (App. B, *infra*, 53a-54a). PEDCo, in turn, contracts with its employees that any violation of their confidentiality duties "will result in immediate dismissal and liability for any damages arising therefrom" (*id.* at 53a-54a n.5). Moreover, under EPA regulations, private contractors retained by the agency agree that regulated businesses that have an interest in confidential information disclosed to contractor personnel are intended beneficiaries of any applicable confidentiality agreement and may enforce such agreements against any breaching employee. 40 C.F.R. 2.301(h)(2)(ii).

EPA officials attempted to inspect respondent's Mt. Pleasant plant in March of 1980. When EPA personnel, accompanied by representatives of the Tennessee Division of Air Pollution Control, and assisting personnel from PEDCo arrived at the plant, respondent denied entry to the PEDCo employee. In ensuing negotiations, respondent attempted to condition admission of PEDCo personnel upon adherence to terms respondent had fixed. In addition to confidentiality requirements and provisions for liability in damages in the event of any breach, the agreement proposed by respondent would have afforded it absolute authority to determine the areas of the plant to be inspected, and required the contractor (and thus EPA) to give it two weeks' advance notice of any inspection (App. A, *infra*, 6a). EPA deemed these provisions unacceptable. Thereafter, on August 7, 1980, EPA secured an administrative warrant from a federal magistrate authorizing inspection of respondent's Mt. Pleasant, Tennessee facility. The warrant covered inspections by EPA employees and "accompanying, authorized representatives under contract to EPA." EPA and state officials, again accompanied by a PEDCo employee, again attempted to inspect respondent's Mt. Pleasant phosphorus plant pursuant to the warrant. Respondent again refused to

permit the PEDCo employee to participate in the inspection of the plant unless its terms for admission were accepted.

2. The following day, August 8, 1980, EPA sought to have respondent held in civil contempt by the United States District Court for the Middle District of Tennessee for its refusal to honor the warrant. Respondent countered with a motion to quash the warrant. Respondent argued that Section 114(a)(2) of the Clean Air Act, which empowers the EPA Administrator "or his authorized representative" to enter upon the premises of stationary pollution sources to sample emissions, does not sanction entry by contractors retained by EPA to assist in such inspections.[2] The opposed applications were consolidated for hearing. On April 17, 1981, the district court denied the motion to quash, holding that the inspection authority granted to "authorized representative[s]" of the EPA Administrator by Section 114(a)(2) extends to properly designated private contractors (App. C, *infra*, 44a-55a).[3] However, because respondent's noncompliance with the warrant was based upon its good faith "belie[f] that private contractors were not authorized representa-

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[2] Although the statutory question had, by the date of the hearing on its motion to quash, been decided in its favor in separate litigation involving a different plant, see *In re Stauffer Chemical Co.*, 14 Env't Rep. Cases 1737 (D. Wyo. 1980), respondent did not argue in district court that the Wyoming district court's decision was to be given preclusive effect. A second decision, contrary to the Wyoming district court's, had been rendered in a case to which respondent was not a party prior to submission of this case to the district court. See *Aluminum Co. of America* v. *EPA*, No. M-30-13 (M.D.N.D. Aug. 5, 1980). A third decision, likewise supporting EPA's position, was rendered in *Bunker Hill Co.* v. *EPA*, Civ. No. 80-2087 (D. Idaho Oct. 15, 1980), after submission but prior to entry of the district court's decision in this case.

[3] In the district court respondent also argued that EPA may not secure administrative warrants on an ex parte basis. The district court rejected this argument (App. C, *infra*, 55a-56a), and although respondent preserved the argument on appeal (see App. A, *infra*, 3a), the court of appeals did not reach that issue. No issue respecting the procedure for issuance of a warrant is presented here.

tives [under the Clean Air Act]," EPA's contempt motion was also denied, without prejudice to its renewal in the event respondent persisted in its refusal to honor the warrant (*id.* at 56a).

Although it observed that the question of statutory interpretation presented was a close one that had divided the district courts (App. C, *infra*, 46a-47a & n.2; see page 4 note 2, *supra*), after canvassing the pertinent statutory language, related statutory language and pertinent statutory legislative history, the district court was persuaded that the Administrator's authority to designate an "authorized representative" under Section 114(a)(2) is not confined to employees of EPA. First, the district court noted that Section 114(c) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7414(c) (which was enacted together with Section 114(a) as part of the 1970 Clean Air Act amendments), authorizes disclosure of confidential information obtained pursuant to a Section 114(a)(2) inspection to "other officers, employees or authorized representatives of the United States concerned with carrying out" the provisions of the act. Because the term "authorized representatives" in this closely related setting necessarily encompasses personnel other than officers and employees of the United States, such as authorized contractors, the district court concluded that the identical term employed in Section 114(a)(2) was to be accorded like scope (App. C, *infra*, 48a, 51a-52a).

Second, the district court noted that the House version of the Clean Air Act Amendments had limited entry and inspection authority to "officers or employees duly designated by the Secretary,"[4] whereas the Senate version, the one ultimately enacted, was broader, encompassing "the Secretary or his authorized representative." Because the plain meaning of the term "authorized representative" extends beyond agency officers and employees to all who are in fact the duly authorized agents of the Ad-

[4] At the time in question EPA had yet to be created, and the Secretary of Health, Education, and Welfare was charged with administration of the Clean Air Act.

ministrator, the district court concluded that agency contractors could participate in Section 114(a)(2) entries and inspections (App. C, *infra*, 50a-51a).

Third, the district court concluded that the usual practice of conducting searches with government personnel did not require a different reading of Section 114(a), because the Clean Air Act embodies a system of comprehensive monitoring of pollution emissions unknown at common law and with no counterpart in traditional police power enforcement schemes, because Congress had recognized the need for technical expertise possessed by contractors in implementation of the Clean Air Act, and because Section 114(c) of the Act makes clear that duly designated contractor-representatives can be provided access to information gained in Section 114(a)(2) inspections, even when such information is confidential (App. C, *infra*, 52a).[5]

The district court also concluded that respondent's concerns respecting confidentiality of proprietary information that might be disclosed to inspection agents did not require limitation of Section 114(a)(2) inspection authority to EPA personnel. Observing that Section 114(c) explicitly authorized disclosure of such confidential data to authorized EPA agents, the court concluded that Congress could not have regarded contractor access to such data to be incompatible with maintenance of confidentiality. Accordingly, the court treated the issue as one of the adequacy of the safeguards available to respondent in this particular case and concluded that the confidentiality provisions of EPA's contract with PEDCo and PEDCo's contract with its employees, together with EPA's regulations empowering respondent to enforce the confidentiality requirements of the foregoing agreements by appropriate legal and equitable remedies, were sufficient to dispel any legitimate concern respecting maintenance of confiden-

[5] Because it deemed the pertinent materials equivocal, the district court declined to adopt EPA's contention that Congress had ratified a consistent administrative practice respecting the application of Section 114(a)(2) (App. C, *infra*, 55a).

tiality, in the absence of any evidence that PEDCo was in competition with respondent in any business (App. C, *infra*, 53a-55a).

The district court also rejected respondent's contention that Section 114(a)(2), which governs inspections of stationary pollution sources (*i.e.* industrial plants), should be interpreted to conform with Sections 206(c) and 208(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7525(c) and 7542(a). The latter provisions govern inspections of motor vehicle plants, and describe the persons authorized to carry out such inspections as "officers and employees duly designated by the Administrator." The district court, concluded instead that the disparate provisions of Section 114(a)(2) and Sections 206(c) and 208(a) should be assigned their natural and distinct meanings, and that the difference "reflect[s] a measured congressional choice" (App. C, *infra*, 48a). The district court also considered legislative history of Section 308 of the Clean Water Act, 33 U.S.C. (& Supp. V) 1318, which was modeled upon Section 114 and enacted in 1972, two years after Section 114(a)(2), suggesting that inspection authority under the Clean Air Act was limited to EPA employees.[6] Although the language "g[a]ve the court pause," it ultimately concluded that such post-enactment legislative history was due relatively little weight in determining the intent of Congress in 1970 when Section 114(a)(2) was enacted. The court concluded that Congress' choice of the broad "authorized representative" language of the Senate bill, in place of the "officers or employees" language of the House bill, was a more telling indication of the pertinent congressional intent (App. C, *infra*, 48a-50a).

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[6] The Senate Report on the 1972 Amendments to the Clean Water Act, S. Rep. No. 92-414, 92d Cong., 1st Sess. 63 (1971), states:

> It should * * * be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which such representatives must be full time employees of [EPA]. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.

3. On appeal, respondent argued for the first time that the decision in *In re Stauffer Chemical Co.*, 14 Env't Rep. Cases 1737 (D. Wyo. 1980), aff'd, 647 F.2d 1075 (10th Cir. 1981) ("*Stauffer I*"), collaterally estopped the United States from contending that the term "authorized representative" employed in Section 114(a)(2) includes a duly designated EPA contractor. *Stauffer I* presented the same legal question as this case, but arose from respondent's resistance to an administrative warrant authorizing inspection by EPA and its contractors of respondent's phosphate ore processing plant in Sage County, Wyoming. As previously indicated (see page 4 and note 2, *supra*), prior to the district court decision in the instant case the Wyoming district court had held in *Stauffer I* that Section 114(a)(2) does not permit EPA contractor personnel to assist in inspections, but respondent had not argued that that decision was to be afforded preclusive effect. *Subsequent* to the entry of the district court's decision in the instant case, the United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment in *Stauffer I*, albeit cautioning that the issue was not "an open and shut matter" and acknowledging that under its decision the Clean Air Act is "not entirely internally consistent." 647 F.2d at 1079.

An unusually fragmented court of appeals reversed the decision of the district court in this case (App. A, *infra*, 1a-41a). While all members of the panel concurred in the judgment, the reasoning of each member was distinct, and each judge wrote separately. Judge Weick delivered what was characterized (*id.* at 1a) as the opinion of the court (*id.* at 1a-33a). Although he "agree[d] with Stauffer that the action is governed by estoppel and res judicata" and that it was therefore "unnecessary to reach other issues," Judge Weick went on to reach the merits "because they were briefed by both parties" (*id.* at 4a) concluding that Section 114(a)(2) does not permit EPA contractors to participate in inspections of stationary pollution sources. Judge Jones joined only in Judge Weick's discussion of collateral estoppel, stating that "the application of

the doctrine precludes this Court from addressing the merits of the issue presented" (*id.* at 34a). District Judge Siler (sitting by designation), on the other hand, concurred only in Judge Weick's opinion on the statutory issue, concluding that "the doctrines of collateral estoppel and res judicata should not be applied here" (*id.* at 39a). Thus, each branch of Judge Weick's opinion spoke for a majority of the court, and the judgment of the court of appeals rests upon alternative holdings.[7]

a. *Collateral Estoppel*—Because "the parties as well as the issues of fact and law in the present case and *Stauffer I* were identical" (App. A, *infra*, 11a), Judge Weick concluded that the doctrine of collateral estoppel described in *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979), was controlling (App. A, *infra*, 8a-13a). He concluded, moreover, that the "unmixed questions of law" exception to the rule of preclusion noted in *Montana* (440 U.S. at 162, quoting *United States* v. *Moser*, 266 U.S. 236, 242 (1924)), was inapposite, characterizing the issue presented on the merits as one governed by a "fact, question or right distinctly adjudged" in *Stauffer I*, rather than "a rule of law [enunciated] • • • in a subsequent action upon a different demand" (*United States* v. *Moser*, *supra*, 266 U.S. at 242) (App. A, *infra*, 12a-13a). Finally, Judge Weick condemned the government's effort to "relitigate[]" (*id.* at 12a) the issue decided in *Stauffer I*, stating (*ibid*; emphasis added) that the government's persistence

> brings up the question, how many times does the government have to lose a case before either the doctrines of collateral estoppel or res judicata are applied? If we were dealing with private parties rather than the government, there would be no question about it. *If EPA really believed the decision of the Tenth Circuit in Stauffer I was wrong, it could have petitioned the Supreme Court for certiorari,*

[7] Judge Weick's reasoning that, notwithstanding the application of collateral estoppel, the merits should be addressed was his alone.

> *but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.*

By contrast, Judge Siler concluded that collateral estoppel had no application in this case (App. A, *infra*, 39a-41a). He stressed that the "federal appellate courts 'traditionally have permitted federal agencies to relitigate substantially identical *legal* issues raised by different transactions or events, after adverse decision elsewhere' " (*id.* at 40a, quoting *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980)). Judge Siler explained further that the issue preclusion rule was not to be applied so as to create an injustice. He concluded that such an injustice would result from application of collateral estoppel "if EPA were precluded from entering with private contractors at Stauffer's plant in Tennessee, but were using private contractors in entering competitor's plants in the same area" (App. A, *infra*, 40a-41a). Judge Siler concluded (*ibid.*), moreover, that

> where several different cases involving the same issues are being litigated simultaneously in separate circuits, collateral estoppel should not be invoked.

Judge Jones wrote separately on the collateral estoppel issue, explaining his concurrence in that branch of the court's opinion (App. A, *infra*, 34a-38a). Under *Montana* v. *United States*, *supra*, Judge Jones recognized (App. A, *infra*, 35a), collateral estoppel is not to be applied where "controlling facts or legal principles have changed significantly" since the judgment in a prior case, or where "other special circumstances warrant an exception to the normal rules of preclusion" (440 U.S. at 155). However, Judge Jones found these exceptions inapplicable (App. A, *infra*, 35a-36a). He discounted Judge Siler's concern that application of collateral estoppel would foster uneven application of the law to parties similarly situated, urging that application of different rules of law to respondent's facilities in different locations would create a more serious inequity. And even though he had

concluded that it was improper for the court to have reached the merits, given the applicability of collateral estoppel (*id.* at 34a), Judge Jones observed that because the other two members of the panel had reached the merits, the inequity that troubled Judge Siler was "illusory." He explained: "[T]he *stare decisis* impact of the Court's holding today, if it becomes final, may be expected to eliminate the practice [of contractor-assisted inspections] in this jurisdiction" [*id.* at 37a; citation omitted]. Finally, while Judge Jones agreed with Judge Siler that federal agencies ordinarily should be able to litigate controlling legal issues in more than a single circuit, he thought that rule inapplicable where the adverse party in the prior case is the same as the present one, and "the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment." (*id.* at 37a, 38a).

b. *Interpretation of Section 114(a)(2)*—Writing for himself and Judge Siler, Judge Weick turned to the underlying question of statutory interpretation (App. A, *infra*, 13a-33a). At the outset, Judge Weick acknowledged the proper interpretation of the statute was not free from doubt, and that under his interpretation internal inconsistencies in the Clean Air Act remained (*id.* at 16a-17a).[8] He also recognized (App. A, *infra*, 15a-16a) that the decision of the Tenth Circuit in *Stauffer I* was at odds with the subsequent decision of the Ninth Circuit on the same issue rendered in a case not involving respondent, *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981) ("*Bunker Hill*"). Nevertheless, after canvassing the pertinent statutory language and legislative history, Judge Weick concluded that Section 114(a)(2) of the Clean Air Act does not countenance assistance by contractors designated as EPA representatives in carrying out the inspections of stationary pollution sources authorized.

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[8] Judge Siler similarly acknowledged that the district court's contrary decision was not clearly incorrect (App. A, *infra*, 41a).

The court of appeals initially rejected EPA's contention that the plain meaning of the term "authorized representative" extended to contractor-representatives designated by EPA (App. A, *infra*, 17a). The court also concluded that no weight could be attributed to Congress' adoption in 1970 of the broad language "authorized representative" from the Senate bill, in preference to the terms "officers or employees" contained in the analogous provision of the House bill, because the respective legislative reports do not address the present question. Moreover, the court of appeals observed that the Conference Report made no mention of any distinction, and indeed, summarized the provisions of the alternative bills in nearly identical terms (i.e., authorizing entry and inspection by "DHEW investigative personnel" as opposed to "DHEW personnel"). The court therefore concluded that Congress intended that the term "authorized representative" serve as a synonym for "officers or employees" (App. A, *infra*, 17a-20a).

In addition, the court of appeals stated that Section 114(d) of the Act, 42 U.S.C. (Supp. IV) 7414(d), added by *1977* amendments, which requires "the Administrator (or his representatives)" to give notice to the appropriate state air pollution control agency before making an inspection under Section 114(a)(2), supports respondent's reading of the term representative in the latter Section. The court reasoned that Congress could not have entrusted "this kind of sensitive intergovernmental communication to employees of private contractors," and that the term "representatives" used in Section 114(a)(2) should be given a similarly narrow reading to conform to Section 114(d) (App. A, *infra*, 20a-21a). Moreover, the court of appeals rejected the conflicting observation of the district court (see page 5, *supra*) that Section 114(a) should be read in conformity with Section 114(c). Although the court of appeals did not dispute that the term "authorized representatives" as employed in Section 114(c) extends the right to disclosure of confidential

material to EPA contractors (App. A, *infra*, 21a), it thought to harmonize all three provisions as follows (*id.* at 22a):

> [T]he word "representative" as used in section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in Section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls.

The Court recognized that the result of its interpretation was to assign two different meanings to the term "representative" as used in Section 114, but it thought this result unavoidable (*ibid.*). Moreover, the court reasoned that because the term "representative" employed in Section 114(c) necessarily denotes persons other than EPA employees, a homologous interpretation of Section 114(a)(2) would mean that the administrator could make inspections of stationary pollution sources *only* through persons other than agency employees (*ibid.*).

EPA also argued that because Section 301(a) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7601(a), authorizes the Administrator to delegate any of her duties (save only the promulgation of regulations) to "any officer or employee of the [EPA]," the term "authorized representative" employed in Section 114(a)(2) is superfluous unless it extends to persons other than EPA personnel such as contractors. Labeling this contention "ingenious" (App. A, *infra*, 23a) the court of appeals nonetheless concluded that "a more natural reading [of Section 114(a)(2)] is that 'authorized representative' contemplates the delegation authorized by Section 301(a)" (*ibid.*).

The court found its task to be "complicated" by the disparate language employed in the statutory provisions authorizing inspection of motor vehicle engines at the manufacturers' plants (App. A, *infra*, 23a; see page 7, *supra*). The court recognized that the use of broader language in Section 114(a) could "just as logical[ly]"

(App. A, *infra*, 24a, 30a) be taken to indicate congressional approval of the participation of agency contractors in statutory inspections. But because there is no mention in the legislative history of an intent to differentiate between authority to inspect stationary sources and authority to inspect motor vehicle engines, and because, in the court's view, "[i]t would be illogical and inconsistent" to interpret Section 114(a)(2) so as to vest EPA with broader authority as to stationary sources, a narrow reading of Section 114(a)(2) was adopted (App. A, *infra*, 25a).

Moreover, unlike the district court (see page 7, *supra*) and the Ninth Circuit (see *Bunker Hill*, *supra*, 658 F.2d at 1284), the court of appeals attached substantial weight to post-enactment legislative history respecting the 1972 Amendments to the Clean Water Act (App. A, *infra*, 26a-29a). The court reasoned that the timing and authorship of the Senate report on Section 308 of the Water Act lent substantial authority to the views expressed respecting previously enacted provisions of the Clean Air Act (App. A, *infra*, 28a). In any event, the court thought it "anomalous" (*id.* at 29a) that contractor-assisted inspections be permitted under the Clean Air Act, but not under counterpart provisions of the Clean Water Act (*ibid.*).[9]

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[9] The court of appeals also suggested that the legislative history of a 1980 amendment to analogous inspection provisions of the Solid Waste Act adding "representative[s]" duly designated by the EPA Administrator to the list of persons authorized to make inspections makes clear the intent to extend authority to persons other than EPA employees, and that the absence of comparable language in the legislative history of the 1970 Clean Air Act Amendments accordingly reflects a contrary intention (App. A, *infra*, 29a-30a).

In addition, the court of appeals rejected EPA's contention (previously accepted by the Ninth Circuit, *Bunker Hill*, *supra*, 658 F.2d at 1284 n.2) that Congress had ratified the agency's interpretation of Section 114(a)(2), by its failure to correct it in amending the Act in 1977. The court found the evidence respecting ratification inconclusive (App. A, *infra*, 31a). The court also found insufficient EPA's contention that Congress had ratified the agency's position

REASONS FOR GRANTING THE PETITION

The twin holdings of the court of appeals both present issues of general and practical importance that warrant further review. The collateral estoppel branch of the court of appeals decision presents an important question respecting the preclusive effect of decisions of lower federal courts upon legal questions of public importance that affect relations between a government agency and a broad class of similarly situated persons. The court of appeals' suggestion that the United States was bound to seek review in this Court of the Tenth Circuit's decision in *Stauffer I* or else be bound thereby is obviously irreconcilable with this Court's certiorari practice, and would moreover require a radical alteration of the practices of the Solicitor General. If allowed to stand, the decision betokens a substantial shift of workload from the courts of appeals to this Court. Moreover, the court of appeals' decision takes no account of the special considerations applicable to government litigation on questions of public law of widespread applicability that have been generally thought to preclude applications of collateral estoppel against the government in such settings. See, *e.g.*, *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, 677 F.2d 118, 121-124 (D.C. Cir. 1981); *Olegario* v. *United States*, 629 F.2d 204, 215 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).

Even if the rule announced were confined to instances in which the party adverse to the government is the same as in the prior case in which an issue was litigated, the decision of the court of appeals would substantially affect the government's litigating practices and impose substantial burdens upon this Court, for it is frequently impossible to know in advance whether the issue decided against the government in a given case will reoccur in litigation with the same party. In any event, as to questions of public law, the decision of the court of appeals

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by approving appropriations for contractor assistance (*id.* at 32a-33a).

fosters an unacceptable disparity in the application of the laws to similarly situated persons. Insofar as the decision of the court of appeals turns upon the identity of the parties in this case and *Stauffer I* it is contrary to the D.C. Circuit's decision in *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 124.

The court of appeals' holding respecting Section 114(a) of the Clean Air Act also merits review. As the court of appeals acknowledged its decision creates a clear conflict with the Ninth Circuit decision in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981). That decision in turn deliberately rejected the Tenth Circuit's reasoning in *Stauffer I*. Because the court of appeals' decision eliminates an important tool employed by the EPA to assure enforcement of the nation's clean air laws, this sharply-drawn conflict merits resolution at this time.

1. Contrary to the view of the court of appeals, *Montana* v. *United States*, 440 U.S. 147 (1979), is not controlling here. As the Court indicated there, 440 U.S. at 155, collateral estoppel is inapplicable whenever "special circumstances warrant an exception to the normal rules of preclusion." We submit that the unique attributes and role of the United States as a litigant involve special circumstances that strongly militate against the application of the preclusion doctrine to government at least when it is engaged in the uniquely sovereign function of enforcing the public law, which governs the legal relations of federal agencies with broad classes of similarly situated persons or businesses.[10] These considerations have been fully outlined in our petition for a writ of certiorari and reply brief in *United States* v. *Mendoza*, cert. granted, No. 82-849 (Jan. 24, 1983), copies of which

[10] Although the United States was a party to *Montana*, no contention was made in that case that the applicability of collateral estoppel was in any respect affected by the government's special attributes and responsibilities. Moreover, as explained below (pages 23-24), these considerations had little if any application in *Montana* itself.

have been provided to respondent. We summarize them here.

First, unlike cases involving only private litigants, application of the issue preclusion doctrines in cases involving the United States must take account of the unique public interest in the uniform and rigorous enforcement of laws of general importance and applicability. See *Standefer* v. *United States*, 447 U.S. 10, 24-25 (1980); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973). Here, as in *Standefer*, this public interest outweighs the considerations that ordinarily underlie the preclusion doctrine.

Second, critical practical and legal realities that are present wherever the United States is engaged in litigation on recurring questions of law of widespread applicability argue strongly against the estoppel invoked by the court of appeals. The government is involved in far more litigation than any other party. Many legal issues of substantial public importance arise only in government litigation, moreover. See *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 121 n.24. (The underlying question of statutory interpretation in this case is typical in this respect.) Thus application of collateral estoppel to bar redetermination of such a legal question by a court of rank coordinate to one that has rendered a decision adverse to the government would substantially interfere with the operation of the prevailing system of development of the public law. In that system courts of coordinate rank are not bound by each other's decisions but apply instead the more flexible doctrine of stare decisis. Conflicts are resolved through the hierarchical process of appeal, en banc review and certiorari. As the courts of appeals and respected commentators have generally recognized, these considerations ordinarily preclude application of collateral estoppel to the government on recurring legal issues. *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 121-124; *Western Oil & Gas Ass'n* v. *EPA*,

633 F.2d 803, 808 (9th Cir. 1980); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974); *Restatement (Second) of Judgments* § 29, comment i (1980).

Third, invocation of collateral estoppel against the government on recurring legal issues is inappropriate because, through the Office of the Solicitor General, the government, unlike any other litigant, employs a formal mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. This process is relatively selective, particularly at the certiorari stage. Moreover, to a degree unmatched by any private party the government takes into account factors other than its narrow interest in prevailing in a particular lawsuit in making this selection. Thus the Solicitor General frequently decides against appeal or certiorari even though the legal conclusions of the deciding court are believed to be erroneous. Such determinations rest upon a host of other factors including a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, limitations upon the resources of the government, and sensitivity to crowded dockets of the courts. Because of the substantial volume of government litigation, and the substantial share of this Court's limited docket already occupied by government cases, self-restraint is particularly necessary in connection with filing of petitions for a writ of certiorari.

This case well illustrates these considerations. No petition was filed in *Stauffer I*. But at the time the case was decided there was no conflicting decision of any court of appeals. Moreover, the pendency in the Ninth Circuit of *Bunker Hill*, an appeal from a district court decision favorable to the government, as well as the pendency of respondent's appeal to the Sixth Circuit from the district court's decision in this case, necessarily counseled against application to this Court for further review in *Stauffer I*. Any other course would have ignored this Court's announced certiorari practices, see Sup. Ct. R. 17.1(a), and would have disserved both the Court and

those litigants who compete for a place on its crowded docket.

Adoption of the novel rule endorsed by Judge Weick (see pages 9-10, *supra*) would compel the United States to reconsider this practice of selective pursuit of appeals and certiorari even though it benefits the public interest and facilitates sound judicial management. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue. As a result, the courts of appeals and this Court would be burdened prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved. Moreover, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. See, *e.g.*, *United States* v. *Foster Lumber Co.*, 429 U.S. 32 (1976) (rejecting the view of three courts of appeals); *NLRB* v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977) (rejecting the view of five courts of appeals). Plainly, there is no interest served by invocation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.

2. The court of appeals evidently concluded that these foregoing principles had no application in the setting of this case because respondent was the party adverse to the government in *Stauffer I* as well as in the present case (App. A, *infra*, 11a, 12a-13a (opinion of Weick, J.); *id.* at 37a-38a (opinion of Jones, J.)). And in Judge Weick's view, this case was directly controlled by the holding of *Montana* v. *United States*, *supra*. We disagree on both accounts.

a. We recognize the force that ordinarily attaches to the distinction between relitigation of issues between parties that have previously litigated them; and relitigation when there is no such identity of parties. In the former situation, a party ordinarily can not claim surprise when

it finds itself bound by a judgment rendered against it, even on a question of law, if neither the factual or legal setting is unchanged. *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare, supra*, 677 F.2d at 121 n.24, 124 & n.46. But where, as here, the issue is a recurring one of public law applicable to a significant class of similarly situated persons, application of collateral estoppel to preclude independent determination of the issues by courts that subsequently consider the issue would—as Judge Siler recognized (App. A, *infra*, 40a-41a)—improperly afford the party that happened to be involved in the prior case decided against the government a favored position in the administration of the law. *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare, supra*, 677 F.2d at 124. As the American Law Institute has recognized (*Restatement (Second) of Judgments, supra*, at § 28):

> [R]elitigation of [an] issue [previously determined] in a subsequent action between the parties is not precluded [when]:
>
> * * * * *
>
> (2) The issue is one of law and * * * a new determination is warranted in order to * * * avoid inequitable administration of the laws * * *.

Contrary to Judge Jones' suggestion (App. A, *infra*, 36a), it is no answer to observe that refusal to apply collateral estoppel will entail a different kind of disparity in the application of the laws—one that depends upon geography. First, refusal to reach the merits need not have that effect, for the doctrine of stare decisis and the persuasive force of the decision of courts of coordinate or inferior rank will in the long run, at least, minimize such "inequities." More importantly, perhaps, the kind of unevenness of result permitted by redetermination of recurring questions of public law is essentially inoffensive. It is a natural result of the operation of a system of lower courts with limited geographical jurisdiction, and a Supreme Court with control over its limited docket.

On the other hand, application of different rules of law to persons similarly situated is in tension with fundamental values of equal justice. Compromise of those values is ordinarily warranted by the competing desiderata of judicial economy, protection of parties against multiple lawsuits, and the role preclusion ordinarily plays in minimizing inconsistent judgments. See *Montana* v. *United States*, *supra*, 440 U.S. at 153-154. But none of these values is advanced by application of collateral estoppel in a setting such as the present one. First, because the issue is one of law and its determination entails no trial-type proceedings, little if any economy is achieved by invocation of collateral estoppel. See page 23, *infra*. And whatever savings may properly be gained when relitigation is not justifiable, are fully achievable under the more flexible doctrine of stare decisis and through due regard for the decisions of coordinate courts. Second, when a recurring question of public law applicable to numerous parties is presented, reliance upon preclusion to govern cases arising between the parties to the original litigation, would on balance foster inconsistent judgments rather than reduce their incidence. And where, as here, the decision afforded preclusive effect is itself inconsistent with the decision of another court of coordinate rank, invocation of collateral estoppel plainly cannot eliminate inconsistent judgments. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 330 & n.14 (1979). The burden of multiple lawsuits, moreover, is a significantly less weighty consideration where, as here, multiple litigation arises from a federal agency's application of a uniform interpretation of a statute applicable to a host of similarly situated parties. By engaging in a regulated business within the various judicial circuits, each of which is ordinarily free (subject only to this Court's decisions) to interpret statutes for itself, respondent subjected itself to the possibility that it would become engaged in parallel litigation presenting a common legal question. See page 22 note 11, *infra*.

Contrary to Judge Jones' suggestion (App. A, *infra*, 38a), respondent's engagement in multiple litigation is not the result of some effort by EPA to "test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment." Rather, this case, like *Stauffer I*, arises from *respondent's* applications to quash the warrants by EPA. Although those applications were triggered by EPA's actions, the agency's actions were not in any sense intended to embroil respondent in litigation. Rather EPA was simply performing its statutory duty to enforce the Clean Air Act through inspections. In seeking to avail itself of the assistance of contractor-representatives EPA merely applied a uniform interpretation of Section 114(a)(2) applicable to others similarly situated to respondent.[11] Thus, in the circumstances of this case the inequity that is produced by application of collateral estoppel is a special circumstance that warrants an exception to the normal rule of preclusion.[12]

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[11] We note that respondent operates plants in thirty states, spanning eleven of the twelve judicial circuits. See [1982] 2 Moody's Industrial Manual 5985. Eighteen of these plants are located within the Ninth Circuit. Query whether under the Sixth Circuit's decision EPA is obliged to follow *Stauffer I* with respect to these plants, notwithstanding the Ninth Circuit's contrary decision in *Bunker Hill*. If so, the resulting discrepancy in the administration of the laws is substantial indeed.

[12] The American Law Institute has rejected the analysis underlying Judge Jones' suggestion that failure to apply preclusion in a setting such as this works the greater inequity (*Restatement (Second) of Judgments, supra*, § 28, comment c):

> In deciding whether to apply issue preclusion * * * the choice is between two forms of disparity in resolution of legal controversy. * * * [T]he choice must be made in terms of the importance of stability in legal relationships between the immediate parties, the actual likelihood that there are similarly situated persons who are subject to application of the rule in question, and the consequences to the latter if they are subject to different legal treatment. *In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of*

Nor does Judge Jones' alternative suggestion (App. A, *infra*, 37a) that the inequity produced by application of collateral estoppel is illusory here because a majority of the Court reached the merits, *support* the application of collateral estoppel. First, because a majority of the court of appeals relied upon collateral estoppel, there was no reason for the court to reach the merits. See *Montana* v. *United States*, *supra*, 440 U.S. at 152-153; *cf. Bowen* v. *United States*, 422 U.S. 916, 920 (1975). Conversely, because a separate majority reached the merits, invocation of collateral estoppel could have none of the salutary effects assigned for the doctrine generally. Neither the court, nor any of the parties was spared any labor associated with a decision on the merits. In short, the peculiar dual holding of the court of appeals amply demonstrates that application of collateral estoppel in this setting is likely to absorb, rather than to conserve, judicial resources.

The fact that the parties in this case and *Stauffer* [illegible] are identical cannot justify application of collateral estoppel for yet another reason. At the time when the Solicitor General decides whether to authorize an appeal, or whether to seek review in this Court of an adverse judgment, it is typically impossible to determine whether future litigation will arise in a case involving the same party or a different party. The Solicitor General's decision—particularly respecting whether to seek certiorari must turn instead upon the general importance of the issue, the existence of a conflict and the other criteria traditionally applied by this Court. If the United States is to be bound in future litigation with the adverse party, however, the mere possibility of future litigation with the same party powerfully militates in favor of further review in many cases that otherwise do not warrant that extraordinary step. Thus, even in its narrowest form, the

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law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of a law.

decision of the court of appeals threatens a substantial distortion of existing litigation standards that would adversely affect the management of scarce judicial resources.

b. Contrary to Judge Weick's view, this case is not controlled by the holding of *Montana* v. *United States*, itself. As explained in our reply brief in *Mendoza* (at 9) the policy and practical considerations we outlined there and here had little application in *Montana*; for the issue presented there could arise in only two forums—the state courts in Montana and the United States District Court for Montana.[13] The issue, too, was not one involving a body of law applicable to a class of similarly situated persons, but one affecting the proprietary interest of the United States. The United States did not argue in *Montana*, as it does here, that the application of the preclusion doctrines was inappropriate in light of the government's special attributes and responsibilities, and the Court's opinion does not reflect any view respecting our present contentions. See also pages 26-27, *infra*.

c. Several other special considerations militate against application of collateral estoppel in the setting of this case. First is the existence of the conflicting decision of the Ninth Circuit in *Bunker Hill*. See *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14. Of course, the decision of the Ninth Circuit was rendered after the district court's decision in this case, but that is equally true of the Tenth Circuit's decision in *Stauffer I*. Indeed, it is unclear what significance was attributed to the appellate affirmance in *Stauffer I*. Insofar as the court of appeals' collateral estoppel ruling rests upon the *Tenth Circuit's* decision in *Stauffer I*, an anomaly is

[13] This consideration is especially significant because in *Montana*, unlike this case, the government had engaged in conduct that may implicate the core concerns underlying the preclusion doctrines. It had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued its parallel action in the federal court. The federal action, moreover, had been filed just after the action in state court was filed, and had been stayed upon the government's stipulation pending resolution of the state court litigation. 440 U.S. at 151.

created. The judgment of the district court was reversed even though the court committed no error on any matter presented to it. See 82-849 Reply Br. at 7. And insofar as the collateral estoppel ruling rests upon the decision of the Wyoming district court, undue weight was afforded to the decision of a district court in another circuit. See *Restatement (Second) of Judgments*, *supra*, at § 29, comment i. These anomalies are the inevitable result of resort to the rigid preclusion doctrine to govern a recurring question of public law affecting a class of similarly situated persons. By contrast, reliance upon the more flexible doctrine of stare decisis and due regard for the persuasive force of the decision of coordinate and inferior courts entails no such difficulties.

Reliance upon collateral estoppel with respect to legal issues is particularly inappropriate in the context of the difficult questions of statutory interpretation that arise under our complex environmental laws. See, *e.g.*, *E.I. DuPont DeNemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.26 (1977); *Western Oil & Gas Ass'n* v. *EPA*, *supra*, 633 F.2d at 808. And this Court has frequently entered into such controversies only after a substantial accumulation of appellate jurisprudence. See, *e.g.*, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 254-255 (1976); *Train* v. *NRDC*, 421 U.S. 60, 72-75 (1975).[14] This practice may be based in part upon the provisions of the major environmental statutes assigning jurisdiction to address certain claims upon a geographical basis, while others are treated as matters of national concern. See, *e.g.*, 33 U.S.C. 1369(b) (Clean Water Act); 42 U.S.C. (Supp. IV) 7607(b)(1) (Clean Air Act). But even where such explicit statutory provision is not made, questions of law under the environmental control statutes are capable of arising in every jurisdiction. Because of the substantial local interest in the manner in which these important

[14] The Court has also denied certiorari notwithstanding an acknowledged conflict among the circuits in appropriate circumstances. See, *e.g.*, *United States Steel Corp.* v. *EPA*, 605 F.2d 283 (7th Cir. 1979), cert. denied, 444 U.S. 1035 (1980).

issues are resolved, it appears particularly inappropriate to import the rigid issue preclusion doctrine into this area. Moreover, because of the prominent role in environmental litigation of large industrial corporations, national trade associations and national environmental advocacy groups, many of which do business or conduct litigation in manifold jurisdictions, any rule that assigns controlling weight to the identity of parties in determining the applicability of collateral estoppel in this setting provides an extra incentive for forum shopping, and also fosters indefensible inequities in the administration of the law to similarly situated parties.[15]

d. The decision of the court of appeals also fails to accord proper effect to the "unmixed questions of law" exception to the preclusion doctrine announced in *United States* v. *Moser*, *supra*, 266 U.S. at 242. See also *Montana* v. *United States*, *supra*, 440 U.S. at 162-163; cf. *Commissioner* v. *Sunnen*, 333 U.S. 591, 601 (1948) (separable facts rule). The court of appeals thought to avoid the application of this doctrine by characterizing the issue presented as one turning upon a "fact, question or right distinctly adjudged" in *Stauffer I*, rather than a "rule of law" enunciated in an action "upon a different demand"

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[15] By way of illustration, we note that United States Steel Corporation challenged the EPA's failure to comply with the notice and comment requirements of 5 U.S.C. 553 in promulgating final rules designating various areas as exceeding national ambient air quality standards for total suspended particulates in the Fifth Circuit, *United States Steel Corp.* v. *EPA*, 595 F.2d 207, modified, 598 F.2d 915 (1979), the Seventh Circuit, *United States Steel Corp.* v. *EPA*, 605 F.2d 283 (1979), cert. denied, 444 U.S. 1035 (1980), and in the Eighth Circuit, *United States Steel Corp.* v. *EPA*, 649 F.2d 572 (1981). Other companies challenged the EPA's procedure in the Third Circuit, *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (1979), the Sixth Circuit, *Republic Steel Corp.* v. *Costle*, 621 F.2d 797 (1980), the Ninth Circuit, *Western Oil & Gas Ass'n* v. *EPA*, *supra*, and the District of Columbia Circuit, *New Jersey Department of Environmental Protection* v. *EPA*, 626 F.2d 1038. It would have been anomalous in the extreme for the result in any of those cases to have turned upon the presence or absence of a particular party—United States Steel.

(App. A, *infra*, 12a-13a; see *United States* v. *Moser*, *supra*, 266 U.S. at 242). But whatever gloss *Montana* v. *United States*, *supra*, may have placed upon the principles announced in *Moser* or *Sunnen*[16] we submit that no "fact, question, or right" decided in *Stauffer I* is controlling here and that this case does arise "upon a different demand" because the inspection in this case pertained to a different plant located in a different judicial circuit.[17] Because of the substantial public interest in allowing independent examination of recurring questions of public law by the various courts of appeals, this factor, unlike the factual differences deemed immaterial in *Montana*, 440 U.S. at 158-163, serves to render the rigid issue preclusion doctrine inapplicable.

3. a. Relatively little need be said respecting the court of appeals' decision on the merits of the question of statutory interpretation. As the court of appeals acknowledged, its decision conflicts directly with the Ninth Circuit's decision in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981). The latter decision in turn expressly disapproves the Tenth Circuit's decision in *Stauffer I*.

The court of appeals' decision eliminates an important tool employed by the EPA to assure enforcement of the Clean Air Act through its overview inspection program. If private contractors may not be designated to assist in conducting Section 114(a)(2) inspections, the agency's ability to operate an effective overview inspection program

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[16] Compare *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, *supra*, 677 F.2d at 119-121; *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1166-1167 (5th Cir. 1981); *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67, 68 (2d Cir. 1982); *Starker* v. *United States*, 602 F.2d 1341, 1345-1347 (9th Cir. 1979) with *Western Oil & Gas Ass'n* v. *EPA*, *supra*, 633 F.2d at 808-809. Unlike the courts of appeals, this Court has never stated that *Montana* alters the rule of *Commissioner* v. *Sunnen*; in any event *Montana* itself treats *Moser* as good law. 440 U.S. at 162.

[17] The *Restatement (Second) of Judgments*, *supra*, § 28, comment c, suggests that application of the distinction drawn in *Moser* (266 U.S. at 242) depends upon whether preclusion would give one person "a favored position in the administration of current law." See page 22 note 12, *supra*.

may be compromised. For instance, 22 technically trained employees employed in EPA's Region IV (the administrative unit encompassing Tennessee) are responsible for monitoring compliance by approximately 4600 major stationary sources of air pollution located in an eight-state area. See Affidavit of James T. Wilburn (App. E, *infra*, 59a).[18] EPA has relied upon contractor-representatives both because its own enforcement resources are limited and because private contractors often possess considerable expertise and experience with certain industrial processes of inspection interest (*id.* at 60a). If EPA may not use the services of contractor-representatives, it will be obliged to hire employees who possess the requisite technical expertise. Because such expertise may be industry-specific, the hiring of numerous experts, each possessing a narrow technical specialty may be required, even though the services of such experts are not necessarily needed on a full-time basis. Accordingly, the decision of the court of appeals is likely to restrict EPA's ability to fulfill its statutory duties in the most efficient manner.

b. On the merits, our contentions are largely summarized in the decision of the district court below, and in the decision of the Ninth Circuit in *Bunker Hill*, upon which we rely. We note here only that the court of appeals' contrary reasoning is severely flawed.

First, there is no sufficient reason for disregarding what the court of appeals acknowledged (App. A, *infra*, 22a) to be the plain meaning of the term authorized "representative." That term, on its face, embraces all duly designated agents of the Administrator. Second, the court of appeals improperly attributed significance to the absence of comment in the legislative history of Section 114 (a)(2) upon the fact that the Senate version enacted into law was broader than its House counterpart. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980). At the same time, the court of appeals gave undue weight

[18] This affidavit was submitted to the court of appeals in connection with the government's opposition to Stauffer's motion for a stay pending appeal, and is part of the record.

to language in the 1970 Conference report. Because the Report simply does not focus on the identity of persons authorized to make inspections, the casual descriptions of the Senate and House bills employed in the Conference Report reflect no view as to the question at issue. See *Bunker Hill*, *supra*, 658 F.2d at 1283-1284.

The court of appeals' effort to "harmonize" Section 114(a), (c) and (d) of the Act (App. A, *infra*, 20a-22a) falls of its own weight. Even if policy considerations suggest that intergovernmental notices required by Section 114(d) should be given by EPA personnel rather than contractor-representatives, it does not follow that Congress employed the term representative in that setting to exclude contractors. Rather, absent any actual indication of congressional intent, it is more reasonable to assume that Congress was content to rely upon EPA's prudence on this point. In any event, because the notices required by Section 114(d) do not require the technical expertise required for actual inspections, there is no reason to believe that Congress even considered the restriction interpolated by the Court.[19]

Finally, contrary to the court of appeals' conclusion, a comparison of the motor vehicle engine inspection provisions of the Act to Section 114(a)(2) suggests that the provisions are different in scope. And contrary to the court's suggestion there is nothing inherently irrational about such a distinction, or about a distinction between the inspection provisions of the Clean Water Act and Section 114(a)(2).

4. Although the first question we present is closely related to that under review in *United States* v. *Mendoza*, No. 82-849, it appears inappropriate simply to hold this case for disposition in light of *Mendoza*. First, this case will not necessarily be controlled by a decision in *Men-*

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[19] We note as well that, contrary to the court of appeals' suggestion (App. A, *infra*, 22a) an interpretation of the term representative employed in Section 114(c) that *includes* persons other than agency employees does not suggest that inspections under Section 114(a) may only be carried out by non-employees.

doza. Unlike this case, collateral estoppel was there applied against the United States even though the opposing party had not participated in the prior case. On the other hand, the Sixth Circuit, unlike the Ninth Circuit in *Mendoza* (see 82-849 Pet. App. 17a n.14) went so far as to hold that the United States was required to seek certiorari unless it planned to acquiesce in the adverse decision of a court of appeals. Finally, the underlying issue in *Mendoza* is one of constitutional law; preclusion in that setting is particularly troublesome because the adverse decision is not subject to legislative correction. Because this case presents an important and recurring variation upon the question to be addressed in *Mendoza*, plenary consideration of this case in tandem with *Mendoza* appears appropriate. In any event, because of the dual holding of the court of appeals, disposition in light of *Mendoza* is not possible here. Accordingly, we suggest this case merits plenary consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1988

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STAUFFER CHEMICAL COMPANY, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Middle District of Tennessee

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Decided and Filed July 7, 1982

Before WEICK,* Senior Circuit Judge, JONES, Circuit Judge and SILER,** U.S. District Judge.

WEICK, Senior Circuit Judge, delivered the opinion of the Court. JONES, Circuit Judge, (pp. 29-32) and SILER, District Judge, (pp. 33-35) delivered separate concurring opinions.

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* Judge Weick became a Senior Circuit Judge at the close of business on December 31, 1981.

** Honorable Eugene E. Siler, Jr., Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

WEICK, Senior Circuit Judge. Stauffer has appealed to this court from an order of the district court denying its motion to quash an invalid administrative search warrant issued ex parte by a United States Magistrate, which authorized EPA to conduct an air pollution inspection of private commercial property belonging to Stauffer, namely, its plant located at Mt. Pleasant, Tennessee, said inspection to be made not only by authorized employees of EPA and the State of Tennessee, but also by unauthorized private contractors objected to by Stauffer to protect it from disclosure of its trade secrets or other proprietary information to competitors or others with a conflict of interest. Stauffer refused to permit the inspection to include the employees of private contractors unless such private contractors signed a nondisclosure agreement to protect Stauffer against disclosure by private contractors of Stauffer's trade secrets. The private contractors refused to execute the nondisclosure agreements prepared by Stauffer and Stauffer refused to permit the inspection of its property. EPA cited Stauffer with contempt of court for refusing the inspection. Stauffer then filed its motion to quash. The contempt citation and motion to quash were heard together by the district judge. He denied the motion to quash holding that the phrase "authorized representative" of the Administrator, as used in Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2)[1] authorizes the EPA to use em-

[1] Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), reads as follows:

> (2) the Administrator *or his authorized representative*, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person or in which any records required

ployees of private contractors in making such inspections and that Stauffer was required to comply with the warrant. He dismissed the contempt citation holding that "[b]ecause Stauffer legitimately believed that private contractors were not authorized representatives under the Clean Air Act, EPA's motion for contempt is denied. If Stauffer's subsequently refuses entry to its Mt. Pleasant plant to authorized representatives of the Administrator presenting proper credentials and a warrant, a contempt citation shall issue." This constituted a final appealable order.

The opinion of the district court in the present case is reported in *United States* v. *Stauffer Chemical Co.*, 511 F. Supp. 744 (M. D. Tenn. 1981).

Stauffer raises important questions on appeal. It argues that the EPA has no authority to obtain ex parte search warrants which would deprive Stauffer of the opportunity to contest the validity of the warrant and a search and seizure in pursuance thereof. Stauffer also contends that the phrase "authorized representative" of the EPA Administrator, used in section 114(a)(2) of the Clean Air Act, means full time employees of the EPA, not employees of private contractors. Further, Stauffer maintains that the EPA is collaterally estopped from bringing this action, because the parties have already litigated the question of who can act as an authorized representa-

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to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under pargraph (1).

(Emphasis added.)

tive of the EPA in a prior lawsuit in the federal courts in Wyoming, which decided the question in favor of Stauffer and against EPA. *Stauffer Chemical Co.* v. *EPA*, 14 E.R.C. 1729, *affirmed* 647 F.2d 1075 (10th Cir. 1981).

Because we agree with Stauffer that the present action is governed by collateral estoppel and res judicata, it is unnecessary to reach other issues, but we will treat all of the issues because they were briefed by both parties.

I

The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, sets up a dual state-federal system of air pollution enforcement. Under the Act, the Administrator of the EPA is responsible for establishing national ambient air quality standards. 42 U.S.C. § 7409. The states are then primarily responsible for enforcing these standards, subject to supervision and approval by the EPA. *See* 42 U.S.C. §§ 7407, 7410, 7412. Pursuant to its mandate under the Clean Air Act, the EPA conducts an "Overview Inspection Program" in which it annually inspects approximately ten percent of the major stationary sources of air pollution in each state. Establishments which are selected for overview inspection have already been inspected by state air pollution authorities at some prior time, with the results of the state inspection being submitted to the EPA. The purpose of the overview inspections is to evaluate the state's performance in implementing the Clean Air Act by comparing the results of the overview inspection with the previously-reported results of the state's inspection.

The State of Tennessee is part of the Environmental Protection Agency's Region IV, which also

includes North Carolina, South Carolina, Kentucky, Alabama, Florida, and Georgia.

On October 17, 1979, Mr. John W. Hund, an environmental scientist employed by the EPA's Enforcement Division in Region IV, conducted an unannounced overview inspection of Stauffer Chemical Company's elemental phosphorus furnace plant in Mt. Pleasant, Tennessee. He was accompanied by two employees of the Tennessee Division of Air Pollution Control. A significant source of air pollution, the number three nodulizing kiln, was not in operation that day. As a result, the amount of pollutants being emitted was not representative of normal operating conditions, so Mr. Hund decided that a follow-up inspection would be necessary.

The follow-up inspection was set for March 27, 1980. On that day, Hund returned to the Mt. Pleasant Plant, along with an employee of the Tennessee Division of Air Pollution Control. He was also accompanied this time by Ronald Hawks and Gary Saunders, who were employees of a private company under contract with the EPA, PEDCo Environmental, Inc. ("PEDCo"). Hawks and Saunders were brought along on this visit because they had recently conducted an EPA overview inspection at Stauffer's elemental phosphorus furnace plant in Tarpon Springs, Florida, and thus were familiar with the processes and equipment involved.

The group arrived at the plant and explained the purpose of their visit. They were informed by the plant manager that Stauffer had no objection to an inspection being conducted by the EPA and Tennessee state employees, but that it was contrary to company policy to admit private individuals to company prem-

ises unless they first signed a suitable nondisclosure and hold harmless agreement.[2] The team then left the plant without conducting the inspection.

During the month of April, negotiations were carried on between Stauffer company headquarters in Connecticut, PEDCo and the EPA in an attempt to arrive at a mutually agreeable nondisclosure agreement. PEDCo employees under contract with the EPA had previously been admitted to Stauffer's Silver Bow, Montana plant after signing a nondisclosure agreement. Therefore, PEDCo forwarded to Stauffer a copy of the agreement which had been used at the Montana plant, together with some suggested modifications requested by the EPA. Stauffer sent back a counter proposal, incorporating many of the provisions suggested by the EPA, but also adding some new ones. Certain of Stauffer's proposals, including one giving Stauffer exclusive control over what areas of the plant were to be inspected and another one requiring the EPA to give Stauffer two weeks advance notice of any inspection, were deemed unacceptable by PEDCo and the EPA. Consequently, they rejected this proposed agreement on May 5, 1980.

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[2] The stated reason for this policy is to protect proprietary information as to trade secrets which outsiders might become privy to, and which might fall into the wrong hands and subject Stauffer to substantial damages for which it might have difficulty to recover complete reimbursement. For instance, Stauffer alleges that PEDCo also serves as a contractor for some of Stauffer's competitors.

The PEDCo employees in the instant case, Hawks and Saunders, had previously been admitted to Stauffer's plant in Tarpon Springs, Florida, by its plant manager, without being asked to sign any nondisclosure agreement. Stauffer maintains that this was unauthorized and was in violation of company policy and should not have been permitted.

Thereafter, the parties had no further contact until August.

On August 7, 1980, the EPA submitted an application and affidavits for a search warrant to inspect the Mt. Pleasant plant, which the magistrate granted ex parte. The warrant permitted

> duly authorized full-time employees [of EPA], and accompanying, authorized representatives under contract to EPA . . . to have entry upon [plant] premises during normal operating hours for the purpose of conducting an inspection, sampling, and monitoring pursuant to Section 114 of the Clean Air Act, 42 U.S.C. § 7414. . . .

There followed a long list of plant facilities and records which the inspectors were to have access to.

Armed with the warrant, an inspection team consisting of EPA's Hund, Ms. Carol Donohue of the Tennessee Division of Air Pollution Control, and Messrs. Hawks and Saunders of PEDCo went to Stauffer's Mt. Pleasant plant on August 7. They were also accompanied by the EPA attorney. Again there was an impasse. After conferring with company headquarters by telephone, plant officials informed the inspectors that the state and federal employees were free to conduct an inspection, but that the PEDCo employees would not be admitted without signing a nondisclosure agreement. Once again, the group left without conducting an inspection.

The next day, the EPA filed a petition in district court to hold Stauffer in contempt for its failure to honor the warrant. At the same time, Stauffer filed a motion to quash the warrant and for a temporary restraining order enjoining its enforcement. (The latter request was subsequently withdrawn by mutual

agreement.) A consolidated hearing on both motions was held in the District Court for the Middle District of Tennessee on August 29, 1980. The court issued its decision on April 17, 1981, holding that the term "authorized representative" in section 114(a)(2) of the Clean Air Act "may include private contractors." 511 F. Supp. at 746. Accordingly, the court refused to quash the warrant. However, it also declined to hold Stauffer in contempt, finding that Stauffer legitimately believed that private contractors were not authorized representatives for purposes of clean air inspections. Execution of the warrant has been stayed pending this appeal.

II

COLLATERAL ESTOPPEL

A threshold issue in the present appeal is Stauffer's contention that consideration of this case is governed by the doctrine of collateral estoppel because the same parties have litigated the identical issues previously resulting in a decision in favor of Stauffer's and against EPA by the federal district court in Wyoming and affirmed by the United States Court of Appeals for the Tenth Circuit.

As noted previously, the hearing in the federal district court in the present case was held on August 29, 1980. Shortly before that, on June 23, 1980, the federal district court in Wyoming issued an opinion holding that the phrase "authorized representative" in Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), does not include private contractors, particularly competitors with a conflict of interest or an axe to grind who may be interested in obtaining Stauffer's trade secrets. *In re Stauffer Chemical Company*, 14 E.R.C. 1737 (D. Wyo. 1980), called

"Stauffer I". (That decision was subsequently affirmed on appeal *sub. nom Stauffer Chemical Co.* v. *Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981)).

The facts in *Stauffer I* were identical to those in the instant case except they arose in a plant of Stauffer's at a different location. One morning in April 1980 a team of EPA inspectors arrived unannounced at Stauffer's Leefe Plant near Sage, Wyoming, in order to conduct a Clean Air Act oversight inspection. The team consisted of state and EPA employees, and two employees of a private contractor GCA Corporation. Stauffer was willing to admit the government employees but not the GCA personnel, unless they first signed a nondisclosure and hold harmless agreement. The EPA team did not agree to this condition and left without conducting the inspection. EPA then obtained an ex parte administrative search warrant from a U.S. Magistrate authorizing it to conduct an inspection of the Leefe Plant through the use of the two GCA employees. When the inspectors returned to the plant with the warrant, Stauffer still refused to admit the GCA employees unless they signed the agreement. This condition was again refused, and the team again departed without accomplishing its mission. Stauffer then filed an application for a temporary restraining order enjoining EPA and the two GCA employees from executing the warrant and a motion to quash the warrant, and the district court after an extensive hearing, permanently enjoined EPA from using GCA employees or employees of other companies under similar contract with EPA, in inspections of any Stauffer plant in Wyoming without the permission of Stauffer. Upon appeal by EPA the judgment of the district court was

affirmed. *Stauffer I*, 647 F.2d at 1076-77 (10th Cir. 1981).

Stauffer therefore contends that, because the parties and the issues in *Stauffer I* and the present case were identical, and the issues were resolved against EPA in the prior litigation, the government acting through its agency, EPA is collaterally estopped from relitigating in this action the issue of who can be an "authorized representative" under Section 114 of the Act.

In *Montana* v. *United States*, 440 U.S. 147 (1979), Justice Marshall, who wrote the opinion for an almost unanimous court with only one dissenting opinion stated:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co.* v. *United States*, 168 U.S. 1, 48-49 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. *Cromwell* v. *County of Sac*, 94 U.S. 351, 352 (1877); *Lawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); 1B J. Moore, Federal Practice ¶ 0.405[1], pp. 621-624 (2d ed. 1974) (hereinafter 1B Moore); Restatement (Second) of Judgments § 47 (Trent. Draft No. 1, Mar. 28, 1973) (merger); *id.* § 48 (bar). Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is con-

> clusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1970); Scott, Collateral Estoppel by Judgment, 56 Harv. L. Rev. 1, 2-3 (1942); Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion). Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra*, at 49; *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

As to res judicata, the Supreme Court, in an opinion delivered recently by Justice Rehnquist in *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398 (1981) stated:

> There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-353 (1877).

Since the parties as well as the issues of fact and law in the present case and *Stauffer I* were identical,

there is no valid reason why they should be relitigated a second time in the present case. It brings up the question, how many times does the government have to lose a case before either the doctrines of collateral estoppel or res judicata are applied? If we were dealing with private parties rather than the government, there would be no question about it. If EPA really believed that the decision of the Tenth Circuit in *Stauffer I* was wrong, it could have petitioned the Supreme Court for certiorari, but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.

The court in *Montana* also addressed the exception of "unmixed questions of law" quoting on page 162 from *United States* v. *Moser*, 266 U.S. 236, 242 (1924) as follows:

> "Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." *Ibid.* (emphasis added). P. 162.

It is noteworthy that "[a] fact, question, or right distinctly adjudged in the original action, cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law." Since the fact, question or right in the present case was dis-

tinctly adjudged in *Stauffer I* the exception in *Moser* is inapplicable here.

We therefore hold that the Environmental Protection Agency is barred from relitigating these issues with Stauffer.

III

A

The central issue in this case if not barred by collateral estoppel and res judicata is the meaning of the phrase "authorized representative" in section 114(a)(2) of the Clean Air Act.[3] 42 U.S.C. § 7414 (a)(2). That section provides:

> (a) the Administrator or his authorized representative, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

To date, few courts have been called upon to consider this question. In addition to the lower court in the instant case, the Ninth and Tenth Circuits have recently examined this issue, reaching opposite conclusions. *See Bunker Hill Company Lead and Zinc Smelter* v. *United States Environmental Protection Agency*, 658

[3] Throughout this opinion, "the Act" will be used to refer to the Clean Air Act, and "section 114" will refer to section 114 of the Clean Air Act, 42 U.S.C. § 7414.

F.2d 1280 (9th Cir. 1981); *Stauffer Chemical Company* v. *Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981). These cases are discussed, *infra*.[4]

B

As noted earlier, the district court in the present case held that the phrase "authorized representative" in section 114(a)(2) of the Act may include private contractors. 511 F. Supp. at 746. The court founded its opinion on three main points: the plain meaning of the words used; a comparison with section 114(c) of the Act; and rejection of a statement in the legislative history of the Clean Water Act which refers to the Clean Air Act.

The court discussed the plain meaning of the words "authorized representative," which were used in the Senate bill, as opposed to the phrase "officers or employees," which was used in the House bill, and reasoned that the adoption of the Senate version evidenced a deliberate choice to give the EPA broader authority in making inspections because the plain meaning of "representative" is broader than "officers or employees." 511 F. Supp. at 747. The court applied similar reasoning to the difference between section 114(c) and the motor vehicle inspection provisions of the Act, found in sections 206(c) and 208(a), 42 U.S.C. §§ 7525(c) and 7542(a). Since the latter sections use the phrase "officer or employee," the court concluded that Congress must have made a deliberate choice to use a broader term in section 114(a). *Id.* at 746.

[4] The issue was also raised recently in the Fourth Circuit, but the case was remanded without reaching the merits. *Aluminum Co. of America* v. *United States Environmental Protection Agency*, 663 F.2d 499 (4th Cir. 1981).

The district court also placed great weight on the use of the phrase "officers, employees, or authorized representatives" in section 114(c) of the Act, 42 U.S.C. § 7414(c). That section allows the Administrator to disclose confidential information obtained in the course of section 114(a) inspections to "other officers, employees, or authorized representatives of the United States" who have a legitimate need for it. As used in section 114(c), "authorized representatives" clearly means someone other than employees, because otherwise it would be redundant. Therefore, reasoned the court, "authorized representative" must mean someone other than employees in section 114(a) as well. *Id.*

The third foundation of the district court's holding was its decision to reject as non-authoritative a statement in the legislative history of the Clean Water Act, which was enacted after the Clean Air Act, to the effect that the Clean Air Act does not permit contractors to be used as "authorized representatives." (This passage will be discussed further, *infra.*) The court admitted that this statement was troubling, but concluded that post enactment statements of legislative intent are an unreliable guide and should not be followed. *Id.* at 747.

In *Bunker Hill Co. Lead and Zinc Smelters* v. *United States Environmental Protection Agency*, 658 F.2d 1260 (9th Cir. 1981), the Ninth Circuit reached the same result as the district court in the case at bar. The *Bunker Hill* court reasoned that the plain meaning of "authorized representative" is broader than "officers or employees." 658 F.2d at 1283, and that the Clean Water Act legislative history was entitled to no weight because it came after the enactment of the Clean Air Act. *Id.* at 1281. The court also found that Congress had tacitly ratified EPA's

use of private contractors by approving appropriations for their use. *Id.*

The Tenth Circuit arrived at the opposite conclusion. In *Stauffer Chemical Co.* v. *Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981), which we have been referring to as *Stauffer I*, the court held that a private contractor cannot be an "authorized representative" of the Administrator under section 114(a)(2). The Tenth Circuit rejected the plain meaning approach, and relied instead upon the legislative history of section 114(a), which speaks of the Department of Health, Education and Welfare (DHEW) (now EPA), "personnel," and noted that employees of a contractor are not EPA personnel, but the contractor's personnel. 647 F.2d at 1078. The court also found the Clean Water Act legislative history persuasive. While noting that post-enactment statements should generally be accorded less weight than contemporaneous legislative history, the court concluded that the Clean Water Act legislative history should be considered because of the close subject matter relationship beween the two acts and the short time span between them. *Id.* at 1079. In addition, a holding that private contractors could be authorized representatives under Section 114(a) would create an unacceptable anomaly between the Clean Air and Clean Water Acts, i.e., EPA could use private contractors to conduct inspections under the Clean Air Act, but not under the Clean Water Act, even though the wording of the two statutes is virtually identical. *Id.*

IV

With these conflicting precedents in mind, we begin our analysis. At the outset, let us frankly admit that although consistency is a virtue in statutory in-

terpretation, various portions of the Clean Air Act are not consistent with each other, making it impossible to arrive at an entirely satisfying result. *See Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, 600 F.2d 844, 870 (D.C. Cir. 1979). The statute itself does not define "representative." *See* 42 U.S.C. § 7602. As the court below noted, both parties in this case have submitted excellent briefs. Indeed, this case is an apt illustration of Chief Justice Marshall's comment that "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived. . . ." *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). The lower court was also correct, though, in saying that there is little that could make the resolution of this problem easier. On balance, however, we believe the Tenth Circuit's position is the correct one.

The district court and the Ninth Circuit relied upon the plain meaning of the word "representative." However, the plain meaning of statutory language is not always decisive. *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962); *Missouri Pacific Railroad Co.* v. *Austin*, 292 F.2d 415 (5th Cir. 1961). This is especially true when the legislative history suggests a different interpretation. *Cleary* v. *Chalk*, 488 F.2d 1315 (D.C. Cir. 1973). The legislative history of an act must be examined in order to ascertain Congressional intent, even though the statutory language appears to be plain. *United States* v. *Kelly*, 328 F.2d 227 (6th Cir. 1964); *United States* v. *Hepp*, 497 F. Supp. 348 (N.D. Iowa 1980); *see Lewis* v. *United States*, 445 U.S. 55 (1980).

The Clean Air Act as originally enacted in 1955 was extensively revised and enlarged by the Clean

Air Act Amendments of 1970, P. L. 91-604. The final version of the Clean Air Act which emerged was an amalgam of the House and Senate bills, title I, relating to stationary air pollution sources, being derived from the Senate bill and title II, pertaining to motor vehicles, coming from the House bill. The house bill, H.R. 17255, consistently used the phrase "officers or employees" throughout. Thus section 112(f) of H.R. 17255 provided:

> For purposes of enforcement of this section, *officers or employees* duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner or person in charge, are authorized to enter, at reasonable times, any establishment which the Secretary has reason to believe is or may be in violation of regulations issued under this section to determine whether any such violation is occurring. . . .

H.R. 17255, 91st Cong., 2d Sess. § 112(f) (1970), *reprinted in A Legislative History of the Clean Air Amendments of 1970* (hereafter cited as "*Air Leg. Hist.*") at 923 (1974) (emphasis added).

The Senate bill, on the other hand, used the phrase "authorized representative." Section 116(a)(3) of S. 4358 provided in part:

> For the purpose of . . . making any investigation under this Act of any building, structure, monitoring equipment, or other facility subject to any air quality standard . . . the Secretary or his *authorized representative* shall have a right of entry to, upon or through such building, structure, or facility, upon presentation of his credentials.

S. 4358, 91st Cong., 2d Sess. § 116(a)(3) (1970), *reprinted in Air Leg. Hist.* at 570 (emphasis added).

The respective legislative histories of these two bills did not discuss the meaning of the phrases used, but merely repeated without discussion the terminology used in the bills. *Compare* H.R. Rep. No. 91-1146, 91st Cong., 2d Sess. (1970), *reprinted in Air Leg. Hist.* at 901, *with* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 58 (1970), *reprinted in Air Leg. Hist.* at 459. The conference report stated that the House bill "authorized entry into and inspection of suspected polluters' facilities by DHEW investigative personnel," while "the Senate authorized entry and inspection by DHEW personnel." [5] Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in Air Leg. Hist.* at 197 and [1970] *U.S. Code Cong. & Ad. News*, 5374, 5379-80. The final version which was enacted and became section 114(a) followed the language of the Senate bill. *Id.*, *reprinted in Air Leg. Hist.* at 198 and [1970] *U.S. Code Cong. & Ad. News* at 5374, 5381.

Although the district court attributed great importance to the difference between the House's "officers or employees" and the Senate's "authorized representative," Congress itself did not. As we have seen, the conference report on the Clean Air Amendments states that the House bill authorized entry and

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[5] At the time the Clean Air Act was being considered, air pollution enforcement was the responsibility of the Department of Health, Education and Welfare (DHEW). Those duties were transferred to the Environmental Protection Agency when it was created. Consequently, "DHEW personnel" should now be read to mean "EPA personnel." *See* Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] *U.S. Code Cong. & Ad. News* 5374, 5374.

inspection by "DHEW investigative personnel" and the Senate bill authorized entry and inspection by "DHEW personnel." It is therefore apparent that Congress considered the two phrases to be equivalent. Although it is ordinarily presumed that a difference in language reflects a difference in meaning when the legislative history shows that no difference was in fact intended, that presumption is rebutted. *Moore* v. *Harris*, 623 F.2d 908 (4th Cir. 1980). As the Tenth Circuit noted, employees of private contractors are not the EPA's personnel, they are the contractor's personnel. *Stauffer I*, 647 F.2d at 1078. Moreover, the language of rejected alternative legislation is not entitled to great weight in construing legislation that was finally passed, since the court has no way of knowing what motivated the legislature to take such action. 73 Am. Jur. 2d *Statutes* § 171 (1974); *see Holt* v. *Middlebrook*, 214 F.2d 187 (4th Cir. 1954).

A statute should be read and construed as a whole and, if possible, given a harmonious, comprehensive meaning. *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973); *Federal Trade Commission* v. *Manager, Retail Credit Co., Miami Branch Office*, 515 F.2d 988 (D.C. Cir. 1975); *Ashcroft* v. *United States Department of Interior*, 513 F. Supp. 595 (D. Ariz. 1981). Construing authorized representatives under section 114(a)(2) to include private contractors would lead to inconsistencies between that section and other parts of the Clean Air Act. Section 114(d), added by the Clean Air Amendments of 1977, P.L. 95-95, requires "the Administrator (or his representatives)" to give notice to the applicable state pollution control agency before making an inspection under section 114(a)(2). The purpose of this notice is to foster cooperation and

consultation between the EPA and the states regarding enforcement matters. H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 136 (1977), *reprinted in* [1977] *U.S. Code Cong. & Ad. News* 1502, 1516. Stauffer argues—correctly, we think—that Congress could not have intended to entrust this kind of sensitive intergovernmental communication to employees of private contractors. Rather, the word "representatives" as used in section 114(d) necessarily envisions EPA employees. In interpreting the meaning of one provision of an act it is proper that all other provisions in *pari materia* also be considered. *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968). Since sections 114(a) and (d) both concern inspections, we conclude that the term "representative" should be given the same meaning in both sections.

The trial court focused instead on section 114(c), 42 U.S.C. § 7414(c), which concerns disclosure of information. That section allows the Administrator to disclose confidential information obtained during section 114(a) inspections to "other officers, employees, or authorized representatives of the United States" who may need it to carry out their duties. The court reasoned, logically enough, that in the context of section 114(c), "authorized representatives" obviously means someone other than officers or employees because otherwise it would be redundant: 511 F. Supp. at 746. We agree that that is the only reasonable conclusion with regard to section 114(c), but we disagree that the use of "representatives" in that section controls the use of that word in section 114(a).

We believe that the interpretation of the word "representative" in these various sections is simply a

matter of grammar. "Representative" in section 114 (c) must mean someone other than officers or employees because they have already been mentioned. However, officers and employees are not mentioned in sections 114(a) and (d). To apply the same meaning to "representative" in those sections would lead to the absurd result that only the Administrator and employees of private contractors could make pollution inspections, and EPA employees could not.

Therefore, the only logical conclusion is that the word "representative" as used in section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls. We realize that this leads to the undesirable result that the word "representative" has different meanings in different portions of the statute, but we suggest that this is one of the instances in which one is simply forced to conclude that there is a lack of congruence between one section of the statute and another. The same phrase used in different sections of a complex act does not necessarily carry the same meaning in each context. *In re Petition of Chin Thloot Har Wong*, 224 F. Supp. 155 (S.D.N.Y. 1963).

This construction of the phrase "authorized representative" in section 114(a)(2) is buttressed by section 301(a) of the Act, 42 U.S.C. § 7601(a). That section provides in part that the Administrator "may delegate to any *officer or employee* of the Environmental Protection Agency such of his powers and duties under this Act, except the making of regulations, as he may deem necessary or expedient." (Emphasis added.) The EPA argues that the word "Ad-

ministrator" in section 114(a)(2) should be construed to mean "officer or employee" on the assumption that the Administrator has already exercised his delegation authority under section 301(a), and therefore "authorized representative" means someone other than officers or employees. While this interpretation is ingenious, we think that a more natural reading is that "authorized representative" contemplates the delegation authorized by section 301(a) which, of course, is limited to officers or employees. Moreover, the word "Administrator" is defined in section 302(a), 42 U.S.C. § 7602(a), as "the Administrator of the Environmental Protection Agency." The statutory definition of that word is therefore limited to the named official, and does not include officers or employees.

Our task is complicated by the fact that the Clean Air Act has comparable, but separate, provisions for inspection of motor vehicle engines at the manufacturers' plants, and these provisions are worded differently. Section 206(c) of the Act, 42 U.S.C. § 7525(c), permits "officers or employees duly designated by the Administrator" to enter the plants of motor vehicle manufacturers for the purpose of testing motor vehicles or engines. Section 208(a), 42 U.S.C. § 7542(a), requires motor vehicle manufacturers to maintain records and provides in part:

> Every manufacturer . . . shall, upon request of an officer or employee duly designated by the Administrator, permit such officer or employee at reasonable times, to have access to and copy such records.[6]

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[6] Section 208(b), 42 U.S.C. § 7542(b), is comparable to section 114(c), 42 U.S.C. § 7414(c), regarding confidentiality of records, and permits the Administrator to disclose confi-

At the time the 1970 Clean Air Amendments were enacted, there was an existing section 207(a) of the Act, former 42 U.S.C. § 1857f-6, comparable to the present section 208(a), 42 U.S.C. § 7542(a), which used the phrase "officer or employee." The 1970 House bill, H.R. 17255, from which the present title II of the Act was derived, retained the language of the former statute in using the words "officer or employee."

As we have seen, Congress chose the Senate version using "authorized representative" in enacting section 114. The EPA argues, and the district court agreed, that the choice of "authorized representative" in section 114(a) as opposed to "officer or employee" in former section 207(a) shows a deliberate decision on the part of Congress to give the EPA broader inspection authority with regard to stationary sources (section 114) than for motor vehicles (sections 206 and 208). However, it is just as logical—and, we think, preferable—to hold that these sections should be construed so that they harmonize with each other, i.e., so that the inspection and entry power for both stationary sources and motor vehicles is limited to EPA officers and employees.

Different portions of the same statute should be read and interpreted consistently with each other, avoiding conflicts. *Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, *supra*, 600 F.2d at 870; *United States* v. *Toledo*,

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dential information to "other officers, employees, or authorized representatives of the United States" when necessary for any proceeding under the Act. The purpose of these provisions is to protect government personnel from liability under the Trade Secrets Act, 18 U.S.C. § 1905, which they would otherwise incur by disclosing such information.

Peoria & Western Railroad Co., 280 F. Supp. 243 (N.D. Ind. 1968); *American Cyanamid Co.* v. *Ladd*, 225 F. Supp. 709 (D.D.C. 1964). In determining the meaning of a statute, a court must consider the consequences that would result from construing it one way or the other *Sheftic* v. *Boles*, 295 F. Supp. 1347 (N.D.W.Va. 1969). It would be illogical and inconsistent to hold that the EPA may use private contractors to conduct inspections under the stationary source portion of the Clean Air Act but not under the motor vehicle portion of the same Act.

Moreover, the legislative history does not reflect any conscious choice on the part of Congress to give the EPA broader authority under section 114 than it has under section 206. The conference report discusses each section of the final bill, but does not mention the difference in phraseology between section 114 and sections 206 and 208. *Compare* the discussion of section 114 in Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] *U.S. Code Cong. & Ad. News* 5374, 5379-81 *with* the discussion of section 206, *id.* at 5382-84.[7] Ordinarily, the use of dif-

[7] The conference report states: "The provisions of the House bill and the Senate amendment revising the procedures under existing law for prototype testing and authorizing production line testing of new motor vehicles and engines were essentially the same . . . ." Conf. Rep. No. 91-1783, 91st Cong., 2d Sess. (1970), *reprinted in Air Leg. Hist.* at 201 and [1970] *U.S. Code Cong. & Ad. News* 5374, 5382. Stauffer argues that this demonstrates, as in the case of section 114, that Congress equated "authorized representatives" with "officers or employees." The EPA contends that the above statement refers only to the provisions for prototype and production line testing, not entry. We believe it is unclear whether this statement was meant to include the entry provisions of the two bills or only the testing procedures, and we therefore give it no weight one way or the other.

ferent language creates an inference that Congress meant different things. However, when the statutory purposes and legislative history establish that no difference was in fact intended, the inference is negated. *Moore* v. *Harris*, *supra*. Since section 114 was taken from the Senate bill and sections 206 and 208 from the House bill, rather than showing a conscious choice on the part of Congress, it seems more likely that the final product was a result of the two bills being tacked together without any thought being given to this small difference in their wording. Allowance must sometimes be made for human error and inadvertence in drafting legislation. *Citizens to Save Spencer County* v. *United States Environmental Protection Agency*, *supra*, 600 F.2d at 871-72.

Another factor which strongly militates in favor of the interpretation which we adopt here is Congress's amendment of the Federal Water Pollution Control Act ("Clean Water Act") in 1972. Section 308(a) of the Clean Water Act, 33 U.S.C. § 1318(a)(B), is copied virtually word-for-word from section 114(a)(2) of the Clean Air Act.[8] The Senate report

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[8] Section 308(a)(B) of the Clean Water Act, 33 U.S.C. § 1318(a)(B), reads as follows:

> (B) the Administrator or his authorized representative, upon presentation of his credentials—
>
> (i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and
>
> (ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample

on S. 2770, which was the basis of the final enactment, says the following about section 308:

> It should also be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees of the Environmental Protection Agency.* The authority to enter is not extended to contractors with the EPA in pursuit of research and development.

S. Rep. No. 92-414, 92d Cong., 2d Sess. (1971), *reprinted in* [1972] *U.S. Code Cong. & Ad. News* 3668, 3729 (emphasis added).

The district court, 511 F.Supp. at 747, and the Ninth Circuit, *Bunker Hill*, 658 F.2d at 1284, dismissed this statement because it was made after enactment of the Clean Air Act. We, on the other hand, believe it is critical.

We realize that ordinarily, "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant" is entitled to little weight. *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). However, this is an exceptional case. The understanding of a later Congress, while not binding, is entitled to deference. *Moore* v. *Harris, supra.* Where a problem of interpretation was apparently not foreseen by Congress, it is appropriate to consult and be guided by those areas covering the same subject where the

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any effluents which the owner or operator of such source is required to sample under such clause.

As stated in the Senate Report about Section 308, the authority to enter is not extended to contractors with the EPA in pursuit of research and development.

expression of legislative intent is clear. *DeAvilia* v. *Civiletti*, 643 F.2d 471 (7th Cir. 1981). The Clean Air and Clean Water Acts are in *pari materia* with one another. *General Motors Acceptance Corp.* v. *Whisnant*, 387 F.2d 774 (5th Cir. 1968); *Hallenbeck* v. *Penn Mutual Life Insurance Co.*, 323 F.2d 566 (4th Cir. 1963); *see Atlantic Refining Co.* v. *Federal Trade Commission*, 344 F.2d 599 (6th Cir. 1965). This is especially true when the Clean Water Act's section 308(a) was explicitly modeled after section 114(a)(2) of the Clean Air Act. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755-56 (1979); *United States* v. *Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962)

Moreover, the Senate report on the Clean Water Amendments was authored a scant ten months after passage of the Clean Air Act, by the same committee (Public Works) which considered the Clean Air Act. Thus, in the circumstances of this case, it is proper to give the quoted statement great weight, even though a similar statement was years later might be of little value.[9]

It should also be noted that section 308(b) of the Clean Water Act, 33 U.S.C. § 1318(b), tracks the language of section 114(c) of the Clean Air Act in permitting the Administrator to reveal confidential

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[9] The district court pointed to the last sentence in the quoted statement regarding contractors and found that, since section 103(b)(4) of the Clean Air Act, 42 U.S.C. § 7403(b)(4), permits the use of contractors for research and development, there was a "lack of congruence" between the Clean Air and Clean Water Acts, making the relevance of the Clean Water Act legislative history questionable. 511 F. Supp. at 747. This overlooks the fact that section 104(b)(4) of the Clean Water Act, 33 U.S.C. § 1254(b)(4), also permits the EPA to contract with private organizations for research and development.

information to "other officers, employees, or authorized representatives of the United States." [10] Since it is manifest that the word "representative" was given two different meanings in section 308 of the Clean Water Act, this reinforces our interpretation, *supra*, giving that word two meanings in section 114 of the Clean Air Act.

As we have seen, section 114 of the Clean Air Act and section 308 of the Clean Water Act are in *pari materia*, and should be interpreted the same way. We have also seen that courts must consider the consequences which would result from a particular construction. *Sheftic v. Boles*, *supra*. As the Tenth Circuit recognized in *Stauffer I*, 647 F.2d at 1079, if the EPA's interpretation of section 114, permitting private contractors to be "authorized representatives" is followed, it would lead to the anomalous result that the EPA could use private contractors to make inspections under the Clean Air Act, but not to make inspections under the Clean Water Act, even though the wording of the statutes is identical. Such a result makes no sense, and we decline to introduce such a blatant contradiction into the law.

It is instructive to compare the statutes which we have been discussing with the Solid Waste Disposal Act Amendments of 1980, P.L. 96-482. Section 3007 of the Solid Waste Disposal Act, 42 U.S.C. § 6927, formerly permitted entry and inspection of facilities which generate or handle hazardous wastes by "any officer or employee of the Environmental Protection Agency, duly designated by the Administrator, or . . . any duly designated officer [or] employee of a State having an authorized hazardous waste program. . . ." The 1980 amendments inserted "repre-

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[10] *See* footnote 6, *supra*.

sentative" after "employee," so that inspection authority is now given to "any officer, employee or representative" of EPA or the states. The legislative history of the 1980 Solid Waste Disposal Act Amendments expressly shows that the word "representative" was added for the specific purpose of covering private contractors: "the amendment clarifies that the Administrator may authorize EPA contractors to obtain samples, perform inspections, and examine records at facilities which handle hazardous wastes." S. Rep. No. 96-172, 96th Cong., 2d Sess. 3 (1979), *reprinted in* [1980] *U.S. Code Cong. & Ad. News* 5019, 5021.

> The Senate bill includes amendments to section 3007(a) to assure that the inspection authority for purposes of developing regulations or enforcement provisions extends to . . . employees and representatives of the Environmental Protection Agency.

H.R. Conf. Rep. No. 96-1444, 96th Cong., 2d Sess. 35 (1980), *reprinted in id.*, 5028, 5034.

The Ninth Circuit compared "authorized representative" in section 114 of the Clean Air Act with "officers or employees" in section 206 of the Act and concluded that, "where Congress meant to limit inspections to officers and employees it did so." *Bunker Hill*, 658 F.2d at 1283. The district court below reached the same conclusion. 511 F. Supp. at 746. Without faulting the logic of that position, we think the shoe can just as logically go on the other foot: section 6927 shows that, when Congress meant to *expand* inspection authority *beyond EPA* officers and employees it knew how to do so and took specific steps to make that clear.

We have criticized the district court's and Ninth Circuit's position, construing "representative" to include contractors, for leading to an inconsistency between the Clean Air and Clean Water Acts. Our position restricting "representative" to officers and employees of the EPA leads to an inconsistency between the Clean Air and Clean Water Acts on one hand the Solid Waste Disposal Act on the other, i.e., under our view the EPA will be able to use private contractors to conduct inspections under the Solid Waste Disposal Act but not under the Clean Air and Clean Water Acts. This inconsistency is also regrettable, but it at least has the virtue of being founded upon express differences in language and explicit statements of Congressional intent, instead of treating identically-worded statutes differently.

EPA argues that Congress has ratified its use of contractors by its failure to amend section 114(a) in 1977 when it enacted that year's Clean Air Amendments (which added section 114(d)), and by approving EPA budget requests which included amounts budgeted for use of contractors in Clean Air enforcement activities. Stauffer counters that there has been no Congressional ratification, only inaction or silence. We agree with the district court that the evidence either way on ratification is inconclusive.

Section 114(d) was added by the Clean Air Amendments of 1977, P. L. 95-95. EPA argues that, while Congress was thus amending section 114, it could have amended section 114(a)(2) if it was dissatisfied with the "authorized representative" language, but did not do so. We agree with the district court's conclusion, 511 F. Supp. at 749, that it does not appear that Congress considered the question of who is an authorized representative at that time. Neither

the legislative history of the House bill, which was enacted, nor the conference report discusses the question of authorized representative. *See* H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 27 (1977), *reprinted in* [1977] *U.S. Code Cong. & Ad. News* 1077, 1105 and H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 135 (1977), *reprinted in id.*, 1502, 1516. "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969). However, as we have discussed above, section 114(d) uses the word "representative" in a sense which can only be synonymous with "officer or employee."

The EPA also argues that Congress has ratified its use of contractors as "authorized representatives" by its approval of agency appropriations requests which included amounts for use of contractors in Clean Air enforcement activities. For instance, EPA quotes a 1977 budget request to "obtain contractor assistance to solve non-attainment problems posed by Class A and Class B emitters."

The Supreme Court has noted that Congressional ratifications may be effected through appropriations acts. However, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944). In our opinion, it is doubtful that an obscure budget item counched in the kind of murky language quoted above is sufficient to plainly show a Congressional intent to ratify the EPA's interpretation of "authorized representative," especially in the fact of an explicit expression of intent to the contrary in the legislative history of the Clean Water Act, discussed *supra*. Also, the appropriation could be construed to provide for the payment of contractors only

where the statute expressly authorized their use such as for research and development and other specific purposes.

By differing with the district court, we do not denigrate the court's able opinion, for cogent arguments can be raised on both sides. The EPA filed affidavits in the court below stating that forbidding it to use contractors in Clean Air oversight inspections would hamper or even cripple the program, and it might also be argued that, in this era of government cutbacks, it is preferable to permit the EPA to use contractors rather than hire more full time employees. On the other hand, the execution of search warrants is a traditionally governmental function, and Stauffer and other owners of commercial property have legitimate concerns regarding the safety of trade secrets when employees of contractors, who may have other clients and conflicting interests, are permitted to conduct inspections under ex parte search warrants issued where the property owner is afforded no opportunity to be heard.

For the reasons outlined above, we hold that the words "authorized representative" in section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), mean officers or employees of the EPA, and cannot include employees of private contractors, and that the district court erred in its holding to the contrary and in failing to quash the search warrant which improperly permitted access to Stauffer's facilities by employees of PEDCo acting as representatives of the EPA.

The judgment of the district court is reversed and the cause is remanded with instructions to order judgment in favor of Stauffer.

JONES, Circuit Judge, concurring. Although I concur with Judge Weick's well-reasoned opinion, I write separately to articulate my views concerning the application of collateral estoppel to the present case.[1] In my opinion, the application of the doctrine precludes this Court from addressing the merits of the issue presented. Accordingly, I limit my concurrence to section II of Judge Weick's opinion.

Application of the doctrine of collateral estoppel involves a consideration of three factors. Under this doctrine, a judgment rendered in a prior law suit between the parties precludes the relitigation of those issues previously raised, considered and determined when a subsequent suit, based upon a different claim or demand, is brought. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597-98 (1948). Thus, a court must initially determine whether the issues presented in the second action are identical to those resolved in the previous action. *Montana* v. *United States*, 440 U.S. 147, 155 (1979). In the instant case, it is undisputed that the issue resolved by the litigation in *Stauffer I* is identical to the question raised in this appeal.

However, the finding of an identity of issues in the first and second action does not end the inquiry. This Court has steadfastly refused to apply the doctrine of collateral estoppel mechanically or rigidly. Rather, this rule is "qualified or rejected when [its] application would contravene an overriding public policy or result in manifest injustice." *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971). *See also Shimman* v. *Frank*, 625 F.2d 80, 89 (6th Cir.

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[1] **As noted by Judge Siler in his concurring opinion, res judicata is inapposite to the present case since this litigation involves a different set of operative facts and hence a different cause of action than *Stauffer I*.**

1980); *United States* v. *LaFatch*, 565 F.2d 81, 83 (6th Cir. 1977), *cert. denied sub nom.*, *LaFatch* v. *MM Corp.*, 435 U.S. 971 (1978); *Bronson* v. *Board of Education*, 525 F.2d 344, 349 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). The Supreme Court, in *Montana* v. *United States*, *supra*, identified the following two questions, both of which must be resolved favorably to the party asserting collateral estoppel before the doctrine can be applied: (1) "whether controlling facts or legal principles have changed significantly" since the judgment in the prior suit; and (2) "whether other special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155.

The first inquiry seeks to prevent the application of collateral estoppel in situations where the legal principles underlying the initial judgment have been altered, thus weakening its conclusive nature. *See Commissioner* v. *Sunnen*, 333 U.S. at 599-602. An examination of the record in the present case reveals that there has been no such change in the legal principles underlying the decision in *Stauffer I*. Therefore, the only remaining issue is whether an exception to the application of the doctrine should be made on equitable grounds.

In *Montana* v. *United States*, the Supreme Court identified one set of circumstances which counsels against the application of the doctrine. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness or fairness of the procedures in prior litigation." 440 U.S. at 164 n.11. Moreover, this Court has identified a number of other circumstances which have been found to justify an exception to the application of the rule. *See, e.g.*, *Hawkins* v. *Holiday Inns, Inc.*, —— F.2d ——, slip

opinion, No. 80-1233 (6th Cir. March 13, 1981) (a broader range of proofs is required in the second action than in the prior action); *Shimman* v. *Frank*, *supra*, (lesser burden of proof required in the subsequent action than imposed in the first); *United States* v. *LaFatch*, *supra* (overriding public policy against bribery of public officials); *Tipler* v. *E. I. duPont deNemours & Co.*, *supra* (differences in the purposes and requirements of the statutory provisions under which the prior and subsequent actions have been prosecuted). *See generally Westwood Chemical Co.* v. *Kulick*, 656 F.2d 1224, 1228-32 (6th Cir. 1981). EPA has not asserted, nor does the record reflect, that any of the circumstances identified by the preceding cases are present.

However, I note that, in his concurring opinion, Judge Siler identifies two apparent sources of injustice which would spring from the invocation of the rule. Initially, he states that "injustice would result if EPA were precluded from entering in Stauffer's plant in Tennessee, but were using private contractors in entering competitors' plant in the same area." I am not persuaded. In my opinion, the injustice, if any, is suffered by Stauffer whose plants and trade secrets in one area will be protected, while in another, private individuals will be able to enter and inspect its facilities. To prevent such an anamoly, collateral estoppel should be applied. *See Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979).[2]

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[2] *Continential Can* involved a somewhat analogous situation. There, a can manufacturer sued to enjoin the Department of Labor from prosecuting pending citations issued as a result of alleged violations of OSHA noise regulations. Previously, a proceeding involving several of the manufacturer's plants in California resulted in a finding that the company had

Further, given the concurrence of two panel members as to the issue of employing private contractors in these inspections, the injustice identified will remain since the EPA will *technically* retain the power to use private contractors elsewhere in the circuit. But even EPA's power to use these individuals in its inspections is illusory since the *stare decisis* impact of the Court's holding today, if it becomes final, may be expected to eliminate the practice in this jurisdiction. *See Allegheny General Hospital* v. *NLRB*, 608 F.2d 965, 970 (3d Cir. 1979). In short, application of collateral estoppel is only minimally related to the harm identified.

Judge Siler also remarks that application of collateral estoppel is improper where several cases, involving the same legal issue, are being litigated in different areas and result in inconsistent decisions. However, I adhere to the position articulated in *Western Oil and Gas* v. *E.P.A.*, 633 F.2d 803, 809 (9th Cir. 1980), where the court concluded, " we think the fact of inconsistent decisions is a relevant, but not always dispositive, factor to be considered in the exercise of discretion [in refusing to apply the doctrine]." In the present case, this factor weighs in favor of applying the doctrine. The Ninth Circuit in articulating this rule relied on dictum appearing in several Supreme Court cases which apparently approve the practice of agency relitigation. *See E.I.*

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fulfilled its obligation by employing the most economically feasible engineering controls. After noting that the manufacturer's other eighty plants, located nationwide, were structurally similar and had the identical noise "problem" as that involved in the prior proceeding, the court held that fairness required an application of collateral estoppel in order to dismiss the pending citations concerning these other plants.

duPont deNemours & Co. v. *Train*, 430 U.S. 112, 135 n.26 (1977); *Union Electric Co.* v. *E.P.A.*, 427 U.S. 246, 254-55 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 72-75 (1975). However, an examination of these cases reveals that they involved circumstances not present here. In each, the agency's relitigation of an issue in several courts of appeal was prosecuted by and against *different* parties as opposed to the *same* party as in the case at bar. Although not dispositive, this factor weighs on the side of the party urging the application of collateral estoppel because its application will serve the following purpose recently enunciated by the Supreme Court:

> To preclude parties from contesting matters that they have had a full and fair opportunity to ligitage protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. *United States*, 440 U.S. at 153-54 (footnote omitted). While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication. Thus, in my opinion, application of the rule is proper.

SILER, District Judge, concurring. I concur with the majority opinion on the merits but disagree with it on procedural grounds, that is, I believe the doctrines of collateral estoppel and res judicata should not be applied here.

Where the history of the cases shows that in *Stauffer I*, as designated in the majority opinion, the Wyoming district court opinion in favor of the EPA was rendered on June 23, 1980, there was legal authority for the action of the EPA at the time it obtained a warrant and went to inspect the Tennessee plant on August 7, 1980. Then, the district court in this case held its hearing on August 29, 1980, while the district court opinion from Wyoming was the only available court decision on the subject.

Next, the district court in Tennessee below rendered its decision on April 17, 1981, not precluded at all from deciding the case by res judicata or collateral estoppel. Then, on May 8, 1981, the opinion from Wyoming was affirmed in *Stauffer Chemical Co.* v. *E.P.A.*, 647 F.2d 1075 (10th Cir. 1981). Apparently no further appeal was attempted in that case, although a rehearing was denied on June 16, 1981. Finally, before the case at bar was argued, the decision in *Bunker Hill Co. Lead & Zinc Smelter* v. *United States E.P.A.*, 658 F.2d 1280 (9th Cir. 1981), was decided on October 13, 1981.

Res judicata is not applicable here, as a cause of action different from that in *Stauffer I* was involved, but collateral estoppel would be applicable. *See Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Hart* v. *Federal Reserve Bank of Atlanta*, 270 F. Supp. 296 (M.D. Tenn. 1966) (Miller, J.), *aff'd*, 379 F.2d 961 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968);

see generally Cream Top Creamery v. *Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967).

However, as stated in *Western Oil & Gas* v. *United States E.P.A.*, 633 F.2d 803, 808 (9th Cir. 1980), federal appellate courts "traditionally have permitted federal agencies to relitigate substantially identical *legal* issues raised by different transactions or events, after adverse decisions elsewhere." That court went on to say at 809:

> Collateral estoppel is not to be applied mechanically. In proper circumstances, it can prevent the waste of judicial resources and shield litigants from duplicative and often vexatious law suits. As the Supreme Court has recently recognized, however, countervailing policies may justify a refusal to apply principles of estoppel.

This doctrine was followed in *Castorr* v. *Brundage*, —— F.2d —— (No. 81-1638, 6th Cir. March 23, 1982), where the Court stated:

> We do not hold that the application of the principles of res judicata and collateral estoppel is mandatory in every case. They are an expression of the policy of federal courts preferring finality, *i.e.*, that litigation at some time must become final. In the face of more important federal policies, however, the preference for finality might be outweighed by more compelling considerations.

Id. at —— (slip opinion at 9). *Accord, Restatement of Judgment* § 70 (1942) (collateral estoppel not to be invoked if injustice would result).

Here, injustice would result if EPA were precluded from entering with private contractors at Stauffer's

plant in Tennessee, but were using private contractors in entering competitor's plants in the same area. Likewise, where several different cases involving the same issues are being litigated simultaneously in separate circuits, collateral estoppel should not be invoked. Thus, collateral estoppel, although legally applicable, is not appropriate here.

Nevertheless, I concur with the majority opinion on the merits of the issue. Where the federal government has embarked upon a policy so radically divergent from its standard policy, that is, having only government officers or employees executing search warrants and inspecting plants, it seems that authority for such conduct should be clear from the Act itself or from legislative history. As the authority to allow the private contractors to be used under the circumstances of this case is not at all clear, EPA should not be allowed to use these private contractors for such inspections until Congress amends its legislation. *Cf. Bread Political Action Committee* v. *Federal Election Commission*, —— U.S. ——, 50 U.S.L.W. 4921 (1982).

In concurring with the majority opinion to reverse the district court I am not suggesting that the lower court "missed the signs on a well marked trial," *Getty* v. *Reed*, 547 F.2d 971, 975 (6th Cir. 1977), for when it rendered its decision below, it had no benefit of an appellate court decision directly on point.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STAUFFER CHEMICAL COMPANY, DEFENDANT-APPELLANT

[Filed Oct. 15, 1982]

Before WEICK,* Senior Circuit Judge, JONES, Circuit Judge and SILER,** U.S. District Judge.

ORDER

No active judge of this court having requested that a vote be taken on the suggestion of the appellee that its petition for rehearing be heard en banc, said petition for rehearing was therefore referred to the panel for consideration and determination.

Upon consideration of the petition for rehearing, we are of the view that the issues in this appeal were adequately dealt with in our slip opinion and that

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* Judge Weick became a Senior Circuit Judge at the close of business on December 31, 1981.

** Honorable Eugene E. Siler, Jr., Judge, United States District Court for the Eastern and Western Districts of Kentucky, sitting by designation.

the petition lacks merit. The appellee has not demonstrated that EPA in conducting a pollution inspection and search of private commercial property of Stauffer Chemical Company needs the services not only of its own employees as well as the employees of the State of Tennessee, but in addition thereto requires the services of a private contractor who is a competitor of Stauffer with conflicting interests who may have an axe to grind and may be interested in obtaining trade secrets of Stauffer.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. TENNESSEE
COLUMBIA DIVISION

No. 80-1029

UNITED STATES OF AMERICA

v.

STAUFFER CHEMICAL COMPANY

Decided and Filed April 17, 1981

MEMORANDUM

WISEMAN, District Judge.

This case is before the Court on motion of plaintiff, United States for the Environmental Protection Agency, for contempt and motion of defendant, Stauffer Chemical Company, to quash an administrative search warrant. The central issue in the case is whether the words "authorized representative" in section 114(a)(2) of the Clean Air Act include private, independent contractors or are limited to employees of the Environmental Protection Agency. The Court holds that private contractors may be considered authorized representatives under the Act.

Facts

On August 7, 1980, the United States for the Environmental Protection Agency [hereinafter EPA] obtained and attempted to execute an administrative search warrant to inspect an elemental phosphorus producing plant of Stauffer Chemical Company [here-

inafter Stauffer] in Mt. Pleasant, Tennessee. EPA sought the warrant [1] pursuant to its authority under section 114 of the Clean Air Act, 42 U.S.C. § 7414.

EPA had contracted with PEDCo Environmental, Inc., to conduct overview inspections. EPA, PEDCo, and PEDCo employees have entered into agreements that are intended to hold the employees to strict confidentiality. See discussion of confidentiality measures *infra*. When representatives of EPA, the Tennessee Department of Public Health, and PEDCo arrived at the Stauffer plant, the PEDCo employee was denied entry, unless he executed an elaborate nondisclosure agreement with Stauffer. Stauffer sought the nondisclosure agreement to protect it from disclosure of trade secrets or other proprietary information. The PEDCo employee refused to execute the nondisclosure agreement because it contained provisions inconsistent with EPA's enforcement policies. One of the most obnoxious provisions would have required the EPA contractor to give the plant two weeks' notice of the date of an inspection.

On August 8, 1980, EPA brought this civil contempt proceeding against Stauffer because of the refusal to allow the PEDCo employee into the plant. That same day Stauffer moved to quash the administrative search warrant issued by the Magistrate.

---

[1] The warrant provided, in part, that:

> EPA, through its duly authorized full-time employees, and accompanying, authorized representatives under contract with EPA, the United States Marshal or any other federal officer, are hereby entitled to and shall be authorized and permitted to have entry upon the [Stauffer Chemical plant] premises during normal operating hours for the purpose of conducting an inspection, sampling, and monitoring pursuant to Section 114 of the Clean Air Act.

These matters were consolidated for hearing on August 29, 1980. Stauffer argues that section 114 of the Clean Air Act does not authorize private contractors to carry out EPA plant inspections, and that EPA is not authorized to use an ex parte proceeding to obtain a warrant to inspect plant premises.

Discussion

At the outset the Court notes that counsel for both sides have submitted excellent briefs in support of their respective theories. Although well-researched and presented memoranda always aid the Court in its decision-making process, little could make resolution of the section 114 question easier. District courts in other circuits have split on this issue.[2] Writing on a clean slate in this Circuit, this Court holds that "authorized representative" may include private contractors.

Authorized Representative

Section 114(a)(2) of the Clean Air Act provides that:

> [*T*]*he Administrator or his authorized representative*, upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be main-

[2] *Bunker Hill Co.* v. *EPA*, No. 80-2087 (D.Idaho Oct. 1, 1980) (authorized representative includes private contractors); *In re Alcoa*, No. M-30-13 (M.D.N.C. Aug. 5, 1980) (decision of Magistrate that authorized representative includes private contractors affirmed); *In re Stauffer Chemical Co.*, 14 Envir. Rep. (BNA) 1737 (D. Wyo. June 24, 1980) (authorized representative does not include private contractors).

> tained under paragraph (1) of this section are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

42 U.S.C. § 7414(a)(2) (emphasis added).

Stauffer argues that only officers and employees of EPA were contemplated as authorized representatives. For support, Stauffer relies on an *in pari materia* construction of section 114 and sections 206 and 208, and the legislative history of the 1970 Clean Air Act Amendments and the 1972 Clean Water Act Amendments. More generally, Stauffer urges that Congress did not intend for private parties to participate in plant searches because law enforcement searches are traditionally carried out by public officials.

Under sections 206(c) and 208(a), 42 U.S.C. §§ 7525(c), 7542(a), only officers or employees duly designated by the Administrator may participate in motor vehicle plant inspections. Stauffer says that this limitation should be read into section 114 because it clearly evinces Congress' intent regarding who can participate in plant inspections. EPA also regards the difference between sections 114 and 206 and 208 as significant, but suggests that the difference was intended to reflect a measured congressional choice. The Court finds EPA's construction more persuasive.

Section 114 contains two references to "authorized representatives." In addition to subsection (a)(2),

subsection (c) allows confidential information obtained under subsection (a) to be disclosed to "other *officers, employees, or authorized representatives* of the United States concerned with carrying out this Act." 42 U.S.C. § 7414(c) (emphasis added). That Congress intended authorized representatives to be distinguishable from officers and employees is obvious from the disjunctive listing in this section. If authorized representatives were limited to officers or employees, the inclusion of authorized representatives in this subsection would have been mere surplusage. The Court will not conclude that Congress intended to be redundant. Moreover, section 114 concerns inspections generally and specifically exempts 42 U.S.C. § 7521 *et seq.*, the motor vehicle plant inspection provisions, from its scope.

Stauffer also argues that clear evidence of congressional intent comes from the legislative history of the Clean Water Act Amendments of 1972, which were modeled after the Clean Air Act Amendments of 1970. In discussing the inspection and entry provisions of the Clean Water Act, section 308, 33 U.S.C. § 1318, two years after the Clean Air Act Amendments had been passed, the Senate Public Works Committee Report limited authorized representatives to full-time EPA employees.

> It should be noted that the authority to enter, *as under the Clean Air Act*, is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees of the* [*EPA*]. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.

Sen. Rep. No. 92-414, 92d Cong., 2d Sess. 63 (1971), *reprinted in* [1972] U.S. Code Cong. & Ad. News

3668, 3729 (emphasis added). Clean Water Act section 308(a)(B) is virtually identical in section 114 of the Clean Air Act.[3]

This portion of the legislative history of section 308 of the Clean Water Act does give the Court pause. The two statutes concern environmental matters; the Clean Water Act was even modeled after the Clean Air Act. The temporal difference in when the words authorized representative were used is not that great, a mere two years. Yet it is difficult to attribute a construction to a statute by virtue of statements made after the statute was enacted. The courts must be concerned with what the legislature that enacted the statute in question meant when the statute was enacted, not what was meant when other legislation was considered years later.

The last sentence of the significant paragraph of the Clean Water Act legislative history states that contractors will not have authority to enter "with the EPA in pursuit of research and development." Section 103 of the Clean Air Act, however, clearly provides for the use of "private agencies, institutions, and organizations, and individuals," 42 U.S.C. § 7403

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[3] [T]he Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

33 U.S.C. § 1318(a)(B).

(b)(4), to "conduct investigations and research and make surveys concerning any specific problem of air pollution," *id.* § 7403(a)(3). This lack of congruence between the legislative history of the Clean Water Act and the provisions of the Clean Air Act makes the relevance of the legislative history of the Clean Water Act questionable. Postenactment statements should be used only sparingly as determinative of legislative intent because of the basic unreliability of statements made with nothing at stake regarding the earlier legislation. A better view of the legislative intent as expressed in legislative history is available when the relevant sections of the Clean Air Act Amendments of 1970 are traced through the maze of legislative committees to enactment.

On June 3, 1970, the Committee on Interstate and Foreign Commerce of the House of Representatives reported out its version of the amendments to the Clean Air Act, which limited entries to "officers or employees duly designated by the Secretary."[4] H.R. 17255, 91st Cong., 2d Sess., *reprinted in* Legislative History of the Clean Air Amendments of 1970, at 918, 923 (1974) [hereinafter cited as Legislative History of 1970]. The Senate version of the Clean Air Amendments was reported out of the Committee on Public Works on September 17, 1970, and it provided for entry by "the Secretary or his authorized representative." S. 4358, 91st Cong., 2d Sess., *reprinted in* Legislative History of 1970 at 570. The Conference Committee obviously resolved the conflict in favor of the Senate version because the enacted statute uses the same terminology. The plain meaning of authorized representative is broader than duly

[4] At that time the Secretary of Health, Education, and Welfare was in charge of air pollution matters.

designated officers or employees. That the Conference Committee and the Congress as a whole chose to enact the broader terms into law is significant.

The final and Senate versions differed from the House version in another significant respect. The requirement of written notice of inspections, contained in the House draft, was omitted in the Senate and final versions. See 42 U.S.C. § 7414(a)(2); Legislative History of 1970 at 151, 570, 918, 923. The philosophy of the Senate and House versions appears to have differed. The Senate version granted the agency more power and authority to enforce the provisions: the requirement of notice of inspections was omitted from the Senate version. Because subsection (c) of section 114 includes authorized representatives in the disjunctive with officers and employees, and because the Conference Committee obviously chose the Senate version over the House version the Court concludes that authorized representative means more than simply officers or employees of the agency.

The power to participate in administrative searches, Stauffer argues, should not be extended to private contractors. Because historically search powers have been entrusted only to public officials, Stauffer contends that the Court should not read Congress' intent as extending the power to private contractors without more specific statutory language.

The relevance of the common law and other historical antecedents to plant inspection searches is minimal because of the different interests at stake. The Clean Air Act embodies a system that comprehensively regulates air pollution. *See* W. Rodgers, Handbook on Environmental Law 208-353 (1977). Although some court actions were available to attack pollution at common law, such as nuisance abatement, modern pollution legislation represents a dra-

matic change toward governmental regulation, supervision, and enforcement. Air pollution and water pollution control guidelines cover matters so complex, such as ambient air quality standards and effluent limitations, that simple exercise by the state of its police power was determined to be ineffective. Federal enforcement was recognized as a prerequisite to meaningful pollution control. Congress expressly recognized that private agencies would be helpful in the investigation and research aspect of air pollution control. 42 U.S.C. § 7403(a)(3), (b)(4). Congress considered private contractors proper recipients of confidential information when duly authorized by the Administrator, *id.* § 7414(c). Thus, it is not unreasonable to conclude that Congress entrusted private parties with the power to enter and conduct onsite monitoring inspections.

Stauffer fears exposure of its proprietary processes by the private contractor who was hired by EPA. Although Stauffer concedes that it cannot prohibit state or federal government employees from entering areas that contain proprietary processes, it argues that even though they are authorized by the Administrator, private contractors stand in different shoes than government employees. Because private contractors are not government employees, they are not subject to criminal sanctions of the Trade Secrets Act, 18 U.S.C. § 1905, which prohibit unauthorized disclosure of trade secrets. The private contractor hired by EPA in this case causes Stauffer some concern because the company is part of the PEDCo group, which in some undetermined capacity may compete with Stauffer.

Clearly Congress envisioned the receipt of confidential proprietary information by persons other than

officers or employees of EPA. *See* 42 U.S.C. § 7414 (c). This Court has held that private parties authorized by the Administrator may enter under section 114. Thus, the issue becomes whether they should be prohibited from entering because of inadequate protection against disclosure.

This Court holds that EPA's contract with the PEDCo employees in this case [5] and EPA regulations, 40 C.F.R. § 2.301(h), are sufficient protection against disclosure. The contract imposes the duty of confidentiality and the penalty of dismissal and damages for breach of that duty. Under the regulations, the private contractor agrees that an "affected business [with] an interest in the information" is entitled to

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[5] The substantive portions of the confidentiality agreements between PEDCo employees and PEDCo provide as follows:

> PEI [PEDCo] possesses certain confidential information, so identified, relating to industrial processes and facilities (referred to below as "confidential information") which it has obtained in the past from its clients. PEI continues to obtain confidential information both directly from its clients and from third parties as a result of work done for its clients.
>
> Employee may obtain confidential information from time to time as a result of visual inspection of records and facilities of PEI's clients or from third parties as a result of work done for PEI's clients.
>
> NOW THEREFORE, in consideration of monies paid to employee by way of salary and other employee benefits, Employee agrees that, except as directed in the course of his employment, he will not disclose any confidential information to anyone, directly or indirectly. Employee further agrees to observe the general security procedures that PEI adopts and understands that any willful violation of the company's general security procedures will result in immediate dismissal and liability for any damages arising therefrom.

third-party beneficiary status under any confidentiality agreement and may enforce the agreement against any breaching employee. *Id.* § 2.301(h)(2)(ii)(c)(1980). If EPA were hiring direct competitors of the affected business to conduct the inspection monitoring, a court might be forced by equitable considerations to put a halt to the practice. It does not appear in this case, however, that PEDCo Environmental, Inc., was in direct competition with Stauffer. If an unauthorized use or disclosure is made, Stauffer can seek injunctive and damage relief against PEDCo and the employee. Likewise, in this Court's opinion an affected business should be able to hold EPA responsible if it can show that EPA could have reasonably foreseen a likelihood of unauthorized use or disclosure.

Stauffer suggests that the Agency has admitted by its own regulations and internal memoranda that authorized representatives means employees or officers. At the very least, Stauffer contends, EPA has not recognized that anyone other than EPA officers and employees can conduct *entries*. On the other hand, EPA says that Congress has ratified the Agency's consistent construction that allows for entry by private contractors by not changing section 114 when it was reviewed in 1977. For purposes of this decision, neither argument is conclusive.

Stauffer overstates its case when it cites 41 Fed. Reg. 36,923 (Sept. 1, 1976) (response to Comment 69) in support of its argument. The Administrator clearly rejected the Comment's statement that only officers and employees may be considered authorized representatives. Stauffer attempts to point out an agency-usage distinction between receiving confidential information and entry. The Agency has used pri-

vate contractors for inspection and entry since 1973, however, and any clearer evidence that the Agency construed authorized representative to include private contractors would be hard to find. Yet, this Court does not wholly accept the ratification argument because it does not appear that the issue of what authorized representative meant was reconsidered by Congress in 1977.

Ex Parte Warrant Procedure

Stauffer raises another issue in support of its motion to quash, that the use of ex parte warrants exceeds EPA's statutory authority. This argument is without merit. As noted earlier, Congress rejected the House version of the 1970 Clean Air Act Amendments, which would have required presentation of prior written notice in order to gain entry upon presentation of credentials. 42 U.S.C. § 7414(a)(2). *Compare* Legislative History of 1970 at 918, 923 *with id.* at 570. To accept Stauffer's argument on this issue would be to write into the statute the House requirement of prior written notice. This Court will not accomplish by judicial fiat what House members were not able to convince Congress to enact.

The use of ex parte warrants for administrative inspections was approved by the Supreme Court in *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed2d 305 (1978). In this case, the ex parte warrant procedure strikes the correct balance between the public and private interests at stake: the affected business is protected from overly burdensome agency actions by having the warrant reviewed by an independent magistrate, and the public is protected by preserving EPA's enforcement power. If an affected business had the opportunity for an ad-

versary hearing before an inspection could occur, it could temporarily shift its plant into compliance with Clean Air standards, only to return to polluting after termination of the inspection. Such activity would undermine EPA's enforcement power. Congress did not intend to limit pollution only when notice of an agency inspection is received.

For all these reasons, Stauffer's motion to quash is denied. Because Stauffer legitimately believed that private contractors were not authorized representatives under the Clean Air Act, EPA's motion for contempt is denied. If Stauffer's subsequently refuses entry to its Mt. Pleasant plant to authorized representatives of the Administrator presenting proper credentials and a warrant, a contempt citation shall issue.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

STAUFFER CHEMICAL COMPANY, DEFENDANT-APPELLANT

[Filed Jul. 7, 1982]

Before: WEICK, Senior Circuit Judge, JONES, Circuit Judge and SILER, District Judge.

JUDGMENT

APPEAL from the United States District Court for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to enter judgment in favor of Stauffer.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal as

itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

/s/ Aucher Crockett
Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-5311

UNITED STATES OF AMERICA, APPELLEE

v.

STAUFFER CHEMICAL COMPANY, APPELLANT

On Appeal from the United States District Court
for the Middle District of Tennessee
Columbia Division

AFFIDAVIT IN SUPPORT OF RESPONSE IN OPPOSITION TO MOTION FOR STAY PENDING APPEAL

JAMES T. WILBURN, being duly sworn upon his oath, according to law, deposes and says:

1. I am Chief of the Compliance Branch, Enforcement Division, United States Environmental Protection Agency (EPA), Region IV. In this capacity, I supervise 22 employees with technical training who are responsible for ensuring that the approximately 4,600 major stationary sources of air pollution located in the eight state area under the auspices of EPA, Region IV, are in compliance with all applicable requirements of the Clean Air Act (the Act), 42 U.S.C. § 7401 *et seq.*

2. To ensure such compliance, these employees' routine job-related duties include numerous tasks, e.g., assessing the adequacy of enforcement activities of state and local air pollution control agencies, ob-

taining technical data about sources from state and local agency files or directly from sources, maintaining and updating EPA's Compliance Data System which provides a record of all Region IV sources' compliance status, conducting plant site inspections to determine compliance firsthand, and assisting in the preparation of enforcement actions where warranted, e.g., notices of violation and administrative orders under Section 113 of the Act, 42 U.S.C. § 7413, notices of noncompliance under Section 120 of the Act, 42 U.S.C. § 7420, and litigation reports for civil or criminal judicial actions.

3. Traditionally, the preceding duties have been performed entirely by EPA, Region IV, personnel, with the notable exception of conducting on-site plant inspections. For on-site inspections, Region IV has relied to a great extent upon the use of private contractors authorized under Section 114 of the Act, 42 U.S.C. § 7414, to conduct such inspections. Private contractors have been so authorized and used primarily for the following reasons:

a. Given the numerous enforcement duties required of the limited number of in-house personnel available, Region IV does not have the resources available to conduct inspections on a large scale; and

2. In many instances, private contractors may possess considerable expertise and experience regarding certain industrial categories which allow for more comprehensive on-site compliance determinations.

4. Accordingly, EPA, Region IV, has relied extensively on private contractors to conduct on-site inspections under the Region IV Overview Inspection Program and the use of such contractors has become

increasingly critical to the success of the program. Under this program, Region IV makes an independent assessment of the compliance status of stationary sources for which the applicable state air pollution control agency has made compliance determinations. Region IV conducts overview inspections of approximately ten percent (10%) of the major sources in each state per year to ensure that the state is accurately monitoring and reporting the compliance status of such sources.

5. While sources chosen for inspection under the overview program are selected based upon neutral administrative criteria, any significant evidence of violation of applicable air pollution regulations obtained during an overview inspection will be used for enforcement purposes.

6. With specific reference to the Stauffer Chemical Company's elemental phosphorus furnace plant in Mt. Pleasant, Tennessee, the purpose of the planned August 7, 1980, inspection of the plant under the terms of Warrant No. 80-3117M by Mr. John W. Hund of my staff and EPA's authorized representatives, Messrs. Ronald Hawks and Gary Saunders of PEDCo Environmental, Inc., was twofold:

a. To complete an overview inspection previously initiated by EPA; and

b. In conjunction with the overview inspection, to conduct sophisticated monitoring of the plant's pollution control equipment to determine if proper operation and maintenance practices were being employed.

7. For both of these purposes, the participation of EPA's contractor was, and is, critical. The PEDCo personnel have conducted prior inspections of elemental phosphorus furnace plants, including a Novem-

ber 28, 1979, inspection of a similar Stauffer plant located in Tarpon Springs, Florida, which Stauffer permitted the PEDCo employees to conduct without objection. As a result, the PEDCo employees have substantial expertise and experience in evaluating the compliance status of the complex processes at these plants. Additionally, Region IV relies upon PEDCo to conduct the sophisticated monitoring procedure referred to in paragraph 6, since the procedure was developed by PEDCo and utilizes equipment employed by PEDCo which Region IV does not have.

8. As part of its monitoring procedure, PEDCo samples various operating parameters of the pollution control devices to determine if the control equipment is operating within design specifications or capabilities. A pitot traverse is performed to determine the air flow through the control device. Motor (fan) current is measured using an amp meter, static pressure is monitored using magnebelic gauges, and temperature is measured with a thermometer. Once these parameters are obtained, a comparison can be made with the parameters obtained during previous official source performance tests at the plant to determine if the control device is operating on a daily basis in a manner consistent with its operation during the formal tests. The process weight (weight of material going through the process) is also monitored or verified and compared to the process weight during previous official source tests. These procedures require magnebelic gauges, pitot probes, amp meters, sample bottles and associated equipment which the EPA, Region IV, Enforcement Division, is not in possession of and does not use.

9. Since Stauffer's initial refusal on March 27, 1980, to allow EPA, Region IV, and its authorized representatives to conduct the necessary inspection

of the Mt. Pleasant plant, Region IV's statutory mandate to ensure compliance with the Clean Air Act has been significantly impaired, and further delays will create additional impairment of the enforcement program, including the following:

a. The integrity of EPA's Overview Inspection Program is being severely hampered by the delay in conducting a comprehensive compliance inspection of the Mt. Pleasant plant. Whereas numerous other sources in Region IV have been subject to overview inspections in which EPA's contractors have participated (70 thus far in Fiscal Year 1981 with 200 total anticipated) and have thereby been subjected to potential enforcement sanctions, Stauffer has long avoided such potential sanctions as a result of the time consumed in the present case. This development has placed Stauffer at an unfair advantage over sources which have been inspected and serves to encourage other sources to defy the Overview Inspection Program.

b. By obtaining a stay of the District Court Order in this case, Stauffer is permanently avoiding certain enforcement sanctions which the Mt. Pleasant plant might otherwise be presently subject to. Under Section 120 of the Act, 42 U.S.C. § 7420, and regulations issued thereunder on July 28, 1980, 45 Fed. Reg. 50086, EPA was required as of January 1, 1981, to issue a Notice of Noncompliance to any source violating specified requirements of the Act. Violating sources are required to pay penalties from the date notice is received until compliance is achieved.

For each day that a comprehensive inspection of the Mt. Pleasant plant is postponed, penalties for which Stauffer might otherwise be liable go permanently unassessed.

10. I know of no instance regionally or nationally, and to my knowledge Stauffer has been unable to cite an instance, in which claimed confidential information obtained either directly by EPA contractors or supplied by EPA to its contractors has been improperly disclosed by a contractor. This is so even though EPA has been increasingly using contractors for compliance inspections since as early as 1973.

11. With regard to Stauffer in particular, as noted in paragraph 7 above, Messrs. Hawks and Saunders of PEDCo conducted a thorough compliance inspection on behalf of EPA, Region IV, of Stauffer's elemental phosphorus furnace plant in Tarpon Springs, Florida, on November 28, 1979. The inspection was permitted by Stauffer without any reference to the need for a signed nondisclosure agreement between PEDCo and Stauffer and without any objection to the contractor's obtaining access to claimed confidential information.

12. Subsequently, there have been no allegations by Stauffer that the claimed confidential information obtained by PEDCo was in any way misused. Further, as Compliance Branch Chief, I would be informed of any improper disclosure of the materials obtained from the Tarpon Springs inspection, and I know of none.

13. The confidentiality procedures employed by PEDCo during and after the Tarpon Springs inspection are procedures which are, based upon my information and belief, routinely followed and would be followed in the compliance inspection of the Mt.

Pleasant plant if permitted in accordance with the District Court Order and Warrant.

14. PEDCo's internal confidentiality procedures and the confidentiality provisions of EPA's contract with PEDCo are set forth in the affidavit of Ronald W. Hawks dated August 7, 1980, submitted to the District Court in support of EPA's warrant application. Further, the August 7, 1980, affidavit of John W. Hund, setting forth in detail EPA's Overview Inspection Program, the chronology of EPA's efforts to inspect the Mt. Pleasant plant, and the critical need for EPA contractor's participation in such inspection was submitted to the District Court in support of EPA's warrant application. I have read each affidavit, am familiar with the contents of each, and know of no facts subsequent to their filing with the Court which would require modification of either affidavit in any material respect.

/s/ James T. Wilburn
JAMES T. WILBURN
Chief, Compliance Branch
Enforcement Division
United States Environmental
Protection Agency
Region IV

Subscribed and sworn to before me at Atlanta, Georgia, this 13th day of May, 1981.

/s/ Gloria R. Knight
GLORIA R. KNIGHT
Notary Public
State of Gergia
My Commission Expires July 7, 1981

AFFIDAVIT OF SERVICE

The undersigned avers that a copy of the foregoing affidavit was mailed to counsel for the appellant, Charles F. Lettow and Eric C. Jeffrey, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036, and Robert J. Walker and Leigh W. Davidson, First American Center, Nashville, Tennessee 37238, by United States mail, postage prepaid this 13th day of May, 1981.

/s/ John H. Johnson, Jr.
JOHN H. JOHNSON, JR.

Subscribed to and sworn to before me at Atlanta, State of Georgia, this 13th day of May, 1981.

/s/ Gloria R. Knight
State of Georgia
Notary Public

My Commission Expires July 7, 1981.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 399186 1287

Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

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March 23, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED *

1. Whether EPA is collaterally estopped from relitigating in this case from the Sixth Circuit, based on an administrative search warrant issued respecting a plant in Tennessee, a question of statutory interpretation which the Tenth Circuit had resolved against EPA in earlier litigation between the identical parties, based on a comparable warrant issued regarding a plant in Wyoming.

2. Whether EPA has power under Section 114(a)(2) of the Clean Air Act to designate private contractors as its "authorized representatives" for purposes of obtaining and executing administrative search warrants.

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* These questions have been restated from those set out in the petition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1448

UNITED STATES OF AMERICA,
Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S MEMORANDUM IN OPPOSITION

Respondent Stauffer Chemical Company ("Stauffer")[1] opposes the petition for writ of certiorari.

STATEMENT

Both in this case (*"Stauffer II"*) and in an earlier litigation between the same parties (*"Stauffer I"*),[2] EPA obtained and sought to execute warrants enabling private contractors to enter and inspect Stauffer's plant premises. At issue are principles at the core of the doctrine of collateral estoppel. The identical question of statutory construction presented in this case was raised,

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, Stauffer's non-wholly owned subsidiaries and affiliates are set forth *infra*, at Appendix A.

[2] *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), *aff'd sub nom. Stauffer Chemical Co.* v. *EPA*, 647 F.2d 1075 (10th Cir. 1981).

argued at length, and decided adversely to petitioner ("Environmental Protection Agency" or "EPA") in *Stauffer I*.

The administrative search warrant in *Stauffer I* was issued on May 8, 1980, by a federal magistrate in the United States District Court for the District of Wyoming.[3] It authorized designated EPA officials and employees of EPA's contractor, GCA Corporation ("GCA"), to enter and inspect Stauffer's phosphate ore processing plant located at Leefe (near Sage), Wyoming. Two EPA officials and two GCA employees sought to execute the warrant on the morning of May 13, 1980. They were accompanied by a state official.[4] Stauffer's plant manager told the EPA and state officials that they were welcome to conduct the inspection but refused entry to the GCA employees absent an agreement to protect trade secrets. The EPA officials decided not to conduct the inspection themselves, and the EPA and GCA group departed. Stauffer immediately moved in federal district court to quash the warrant and also sought a temporary restraining order enjoining execution of the warrant. The court granted such an order on the same day, May 13, 1980.

Thereafter, a two-day evidentiary hearing was held in the district court, and on June 23, 1980 the court entered judgment quashing the warrant and enjoining EPA from causing its private contractors to enter Stauffer's plants in Wyoming to conduct inspections. The court's ruling was premised on alternative grounds: *first*, that EPA had no authority under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), to designate private contractors as its "authorized representatives" for

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[3] This recitation of facts regarding *Stauffer I* is adapted from the findings of fact made by the district court, reported at 14 Env't Rep. Cas. (BNA) 1737-1740.

[4] The inspection was to be made in connection with EPA's "compliance evaluation oversight program" (14 Env't Rep. Cas. (BNA) 1739, ¶ 14), for the purpose of auditing state enforcement and inspection procedures. *Id.*

purposes of entry and inspection; and *second*, that in the particular circumstances EPA's use of an *ex parte* procedure to obtain the administrative search warrant from the federal magistrate violated principles of fundamental fairness. On August 19, 1980, EPA filed notice of its appeal to the Tenth Circuit.

After the Wyoming federal court's decision but before EPA's appeal from that decision was filed, EPA sought from a federal magistrate sitting in Nashville, Tennessee, a similar administrative search warrant for a contractor to enter and inspect another Stauffer plant.[5] The warrant was issued on August 7, 1980, and authorized EPA to use a contractor, PEDCO Environmental, Inc. ("PEDCO"), to conduct an oversight inspection at a Stauffer elemental-phosphorus plant located in Mount Pleasant, Tennessee. On that same day, an EPA official and two PEDCO employees arrived at the plant to make the inspection. A Tennessee official accompanied them. Again, Stauffer's plant staff welcomed inspection by the EPA and Tennessee officials but refused to allow entry by PEDCO's employees in the absence of a written agreement to protect trade secrets. No inspection was made. On the following day, EPA filed in federal district court a petition for an order to show cause why Stauffer should not be held in contempt, and Stauffer filed a motion to quash the warrant and an application for a temporary restraining order barring its execution. The petition and motion were consolidated by the district court. Stauffer's application for a temporary restraining order was mooted by EPA's agreement not to seek to execute the warrant pending the court's decision on the cross-motions.

On April 17, 1981, the Tennessee federal district court denied Stauffer's motion to quash and also denied EPA's contempt petition on the ground that "Stauffer legiti-

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[5] This recitation of facts regarding *Stauffer II* is taken from the opinion of the district court, reported at 511 F. Supp. 744, 745 and reprinted at Pet. App. 44a, 45a.

mately believed that private contractors were not authorized representatives under the Clean Air Act" to perform inspections. (Pet. App. 56a; 511 F. Supp. 750.) Stauffer promptly appealed, and after the district court refused to stay its decision and execution of the warrant pending appeal, Stauffer obtained a stay to that effect from the Sixth Circuit.

On May 8, 1981, three weeks after the Tennessee federal district court's decision, the Tenth Circuit affirmed the Wyoming federal district court's decision quashing the warrant there at issue and enjoining EPA from using contractors to make inspections at Stauffer's plants in Wyoming. *Stauffer Chemical Co.* v. *EPA*, 647 F.2d 1075 (10th Cir. 1981). The Tenth Circuit's decision rested squarely and solely on the ground that private contractors were not "authorized representatives" of EPA for purposes of Section 114(a)(2) governing administrative searches. EPA unsuccessfully sought rehearing but did not file a petition for certiorari in this Court.[6]

Stauffer's appeal to the Sixth Circuit was decided on July 7, 1982. The court of appeals reversed the Tennessee federal district court, adopting two alternative grounds for its decision that the warrant should have been quashed. Each of the three judges wrote separately. Judge Weick, joined by Judge Jones, concluded that EPA was collaterally estopped from obtaining a warrant authorizing a private contractor to make an inspection, because of the prior decision in *Stauffer I* as affirmed by

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[6] Because the Wyoming federal court in *Stauffer I* based its holding on alternative grounds, for purposes of collateral estoppel its judgment was not necessarily conclusive as to either of the grounds standing alone. *See Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168-73 (5th Cir. 1981); *Restatement (Second) of Judgments* § 27, comment i (1980). However, when the Tenth Circuit upheld the Wyoming federal district court's interpretation of the Clean Air Act, the judgment then definitely became conclusive as to that ground. *See Hicks* v. *Quaker Oats Co., supra; Restatement, supra,* comment o.

the Tenth Circuit. (Pet. App. 8a-13a, 34a-38a; 684 F.2d 1179-81, 1190-92.) District Judge Siler, sitting by designation, did not agree that the doctrine of collateral estoppel applied. (Pet. App. 39a-41a; 684 F.2d 1192-93.) Judge Siler joined Judge Weick, however, in concluding that Section 114(a)(2) of the Act did not permit EPA to designate contractors as its representatives for purposes of entry and inspection. (Pet. App. 39a; 684 F.2d 1192.)[7] Judge Jones did not reach this issue of statutory construction because of his expressed view that, as to Stauffer, EPA was collaterally estopped from rearguing the issue. (Pet. App. 34a; 684 F.2d 1190.) Each judge thus joined in the result, and Judge Weick's opinion spoke for a majority of the court on each of the two alternative holdings.

A petition for rehearing and rehearing *en banc* was denied.[8]

REASONS FOR DENYING THE PETITION

A. The Sixth Circuit Properly Invoked Principles At The Core Of The Doctrine Of Collateral Estoppel

The collateral estoppel prong of the Sixth Circuit's decision rests squarely on principles at the core of the doctrine of collateral estoppel. In the Wyoming federal district court and the Tenth Circuit, EPA fully and fairly

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[7] Subsequent to the decision of the Tenth Circuit on the statutory-construction question, the Ninth Circuit had ruled in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981), that EPA was empowered by Section 114(a)(2) of the Act to designate private contractors as its representatives for purposes of entry, search, and inspection. Judge Weick's opinion (in this respect for himself and Judge Siler) acknowledges and discusses the direct conflict in decisions between *Stauffer I* and *Bunker Hill*, criticizes the Ninth Circuit decision in *Bunker Hill*, and comes down squarely in agreement with the Tenth Circuit in *Stauffer I*. (Pet. App. 15a-21a; 684 F.2d 1182-89.)

[8] The court's opinion denying rehearing is reported at 684 F.2d at 1193. *Compare* Petition at 1.

litigated with Stauffer the question of EPA's power to designate private contractors to enter, search, and inspect plants, and EPA lost. If collateral estoppel is ever to be applied in a suit by the government against a private litigant, it should be applied here; the subsequent action originating in Tennessee federal district court involved precisely the same question and the same parties.

This Court has outlined the policies behind collateral estoppel as follows:

> To preclude parties from contesting matters that they have a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.
>
> *Montana* v. *United States*, 440 U.S. 147, 153-54 (1979).

These policies are reflected in the description of the doctrine of collateral estoppel found in the *Restatement (Second) of Judgments* § 27 (1980):

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

No question has been raised here or in the Sixth Circuit concerning (1) EPA's full and fair opportunity to litigate in the Wyoming federal district court and the Tenth Circuit, (2) the actual litigation of the statutory contractor-search question in those courts, (3) the determination of the question in a valid and final judgment by those courts, and (4) the essentiality of such determination to the judgment of the Wyoming federal district court as affirmed by the Tenth Circuit.[9]

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[9] See *supra*, at 4 n.6.

Most importantly, the parties to both cases are the same. Such mutuality of parties to successive litigation is no longer a prerequisite for invocation of issue preclusion by way of collateral estoppel. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326-328 (1979). Mutuality nonetheless remains an important consideration in applying collateral estoppel in a particular case. *See American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, 677 F.2d 118, 121 n.24, 124 (D.C. Cir. 1981).[10]

This also is an instance of defensive use of collateral estoppel. Stauffer has sought to prevent EPA from asserting a purported right (to designate contractors as its representatives for purposes of entry, search, and inspection) which EPA has previously litigated and lost against Stauffer. *See Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.4 (1979). Stauffer ought not to be forced to litigate precisely the same question over and over again. In the circumstances, Stauffer faced not only the expense of relitigation but the risk of a contempt citation for refusing to obey the warrant.

In *Montana* v. *United States*, *supra*, the foregoing fundamental principles were fully recognized, and collateral estoppel was applied against the government. This Court held that, like any other litigant, the government could not bring multiple lawsuits against the same party in the hope that it might eventually find a court that accepted the government's arguments. EPA's petition essentially amounts to a request that the Court overrule *Montana*.

EPA attempts to avoid the direct application of *Montana* by suggesting that "special circumstances," 440 U.S.

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[10] The *Restatement (Second) of Judgments* continues to separate principles relating to relitigation "between the parties" (§§ 27, 28), and "Issue Preclusion in Subsequent Litigation with Others" (§ 29, heading). Section 29 of the *Restatement* sets out additional considerations which should be addressed before invoking collateral estoppel in situations where mutuality is not present.

at 155, are present in this case, which warrant an exception to the otherwise normal application of collateral estoppel. The "special circumstance" suggested by EPA is the government's interest in relitigating important questions of public law that have general applicability to broad classes of persons or businesses. For support, EPA relies heavily on the opinion of the Court of Appeals for the District of Columbia Circuit in *American Medical International, Inc.* v. *Secretary of Health, Education, and Welfare*, 677 F.2d 118 (D.C. Cir. 1981).

In *American Medical*, the court did recognize the interest of the government in relitigating questions of law, when such questions are raised in subsequent suits against *different* parties than those who were present in the court where the issues were first joined. In the *American Medical* case, however, the court noted that the situation was different when the subsequent litigation was between the same parties:

> The foregoing analysis intercepts only parties who did not participate in the initial suit. If the Government is litigating with the same adversary in both cases, an estoppel will petrify the law only as to that one party—obviously not an unjust result—and accordingly will work no preclusion generating national shockwaves.
>
> Id. at 124.

The only reason that the court did not allow estoppel in *American Medical* was that the private party in the original suit had subsequently merged with another defendant in the second case. Applying estoppel, therefore, would have resulted in using different rules of law for different subsidiaries of the same corporation, an obviously unacceptable result. No such problem exists here.

The Sixth Circuit in this case likewise considered the special interest of the government in relitigating legal

questions and refused to give it dispositive weight.[11] As Judge Jones noted in his concurring opinion:

> While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication.
>
> (Pet. App. 38a; 684 F.2d 1192.)

And in *Montana* itself, while not directly addressing the question, the Court did not recognize any overriding governmental interest, but rather pointed significantly to the generally applicable considerations bearing on invocation of collateral estoppel. *See Montana* v. *United States*, *supra*, 440 U.S. at 153-54.

In sum, if the position pressed here by the government is accepted, the proffered exception will swallow the rule, and collateral estoppel will never again be available to cut off successive suits by the government involving issues of law. The government may always argue that its position in a case is of national legal significance. In *Montana*, for instance, the government's suit was based on the Fourteenth Amendment and the Supremacy Clause.

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[11] The Sixth Circuit did not fail to consider the Supreme Court cases that approve of agency relitigation. *See, e.g., E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977); *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975). Judge Jones' opinion particularly noted key distinctions between those cases and this one: relitigation in those cases involved "different parties as opposed to the *same* party," and this case involves a defensive rather than offensive use of collateral estoppel. (Pet. App. 38a; 684 F.2d 1191-92 (emphasis in the original).) In comparable circumstances, these distinctions have been applied by other courts of appeals to reach the conclusion that the government should be estopped. *See United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980); *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979); *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979).

Certainly those issues are as important as a question of statutory construction under the Clean Air Act.

B. The Sixth Circuit Correctly Concluded That EPA Could Not Designate Private Contractors To Enter, Search, And Inspect Plants

The controversy at the heart of this case turns on the meaning of the phrase "authorized representative" in Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2). That section provides generally that "the Administrator [of EPA] or his authorized representative" may enter, search, and inspect premises subject to regulation under the Act. The Sixth Circuit, after a careful and painstaking review of all relevant considerations, reached the correct result when it held that a private contractor could not be such an "authorized representative." [12]

The function and purpose of a statute have important roles to play in statutory construction. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981). That role is particularly appropriate in a case such as this, where the phrase in question has not been defined in the Clean Air Act, and the controversy over its meaning cannot be resolved on the face of the Act.[13]

The Sixth Circuit carefully and precisely parsed the provisions of Section 114(a)(2), considering especially the language of that particular statutory paragraph, the legislative history, other related portions of the Act, and ancillary aids to statutory construction. The court initially reviewed the conflicting decisions of the Tenth Circuit in *Stauffer I* and the Ninth Circuit in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1260 (9th Cir. 1981). (Pet. App. 15a-16a; 684 F.2d 1182-83.) Its assessment of the lan-

[12] Because Judge Siler joined the portion of Judge Weick's oipnion which dealt with this issue, it will be denominated as the "court's" or as the "Sixth Circuit's" ruling.

[13] In *Amax Coal*, this Court also construed the term "representative" as it is used in the National Labor Relations Act.

guage of Section 114(a)(2) and of the issues presented reflects the prior analyses by the courts in *Stauffer I* and *Bunker Hill*. The Sixth Circuit observed that perfect internal consistency could not be attained among the various provisions of the Clean Air Act.[14] Then, the court turned to the specific legislative history of Section 114(a)(2). The court noted that in the pertinent House and Senate Committee Reports, the terms "authorized representative" and "officers and employees" were treated as being identical in meaning. Both were understood to refer to "DHEW personnel;" neither was intended to refer to private contractors. (Pet. App. 18a-19a; 684 F.2d 1183-84.) (The Department of Health, Education, and Welfare administered the Act prior to EPA's formation.)

The court also attempted to determine which of the alternative meanings would be most consistent with the various other provisions of the Clean Air Act that use the phrases "authorized representative" or "officers and employees." (Pet. App. 20a-26a; 684 F.2d 1184-86.) Though perfect harmony among the provisions was impossible, the court found that substantial difficulties were created if "authorized representative" in Section 114(a)(2) was defined to include anyone other than EPA employees. For example, Section 114(d) directs "the Administrator (or his representatives)" to give notice to the relevant state agency before making an inspection under Section 114(a)(2).[15] The court concluded "that Congress would not have intended to entrust this kind of sensitive intergovernmental communication to employees of private

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[14] The Act has become known as one of the Nation's most complex and subtle pieces of legislation. While part of the reason for this distinction is attributable to the Act's numerous detailed provisions, part of the difficulty in construing many of the Act's provisions stems from considerations of legislative drafting. This case falls in the latter category. The word "representative" is used three times in Section 114, in subsections (a)(2), (c), and (d), and each time the word in context could have a different meaning.

[15] Both the inspection in Wyoming and that in Tennessee were designed to audit state monitoring and enforcement efforts.

contractors." (Pet. App. 21a; 684 F.2d 1184.)[16] Also, in Section 206(c) of the Clean Air Act, Congress authorized "officers and employees" of EPA to enter the plants of motor vehicle manufacturers for testing vehicles or engines. Nothing in the legislative history of the two sections suggested that Congress meant to give EPA broader authority with regard to inspections under Section 114 than under Section 206. To the contrary, the legislative history suggested that the use of the two different terms was nothing more than a drafting accident, and that the two facially different terms were intended to have identical meanings. The court found it more logical to assume that Congress meant to harmonize the inspection and entry power under both sections, thereby limiting it to only EPA officers and employees. (Pet. App. 23a-26a; 684 F.2d 1185-86.)

The Sixth Circuit found further support for its reading of Section 114(a)(2) in the legislative history of the 1972 amendments to the Federal Water Pollution Control Act ("Clean Water Act"). Section 308 of the Clean Water Act, 33 U.S.C. § 1318, was enacted approximately 18 months after Section 114 of the Clean Air Act, and was taken virtually word-for-word from Section 114. Regarding the matching provision of the Clean Water Act, the Senate report on the bill which was the basis for final enactment stated:

> It should also be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which

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[16] The court decided that the word "representative" when used in Section 114(c) did mean someone other than officers and employees of the Agency. (Pet. App. 21a-22a; 684 F.2d 1184-85.) Section 114(c) allows EPA's Administrator in specified circumstances to disclose confidential information, however obtained by the Agency, to "other officers, employees or authorized representatives of the United States." This Section thus on its face covers at least people at other federal agencies (*e.g.*, federal judges, attorneys at the Department of Justice and U.S. Attorneys, and Coast Guard officers and officials) and may reach more broadly than that.

> *such representatives must be fulltime employees of the Environmental Protection Agency.* The authority to enter is not extended to contractors with the EPA in pursuit of research and development.
>
> S. Rep. No. 414, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 *U.S. Code Cong. & Ad. News* 3668, 3729 (emphasis added).

The court found this legislative statement of intent to be convincing, based on the close connection between the Clean Air and Clean Water Acts and the very short period of time that had elapsed between passage of the Clean Air Act and issuance of the report on the Clean Water Act. (Pet. App. 26a-29a; 684 F.2d 1187-88.)

The Sixth Circuit rejected EPA's claim that Congress, by its inaction, had somehow ratified EPA's use of private contractors in conducting inspections. (Pet. App. 31a-32a; 684 F.2d 1189.)

The Sixth Circuit also observed that "the execution of search warrants is a traditionally governmental function." (Pet. App. 33a; 684 F.2d 1189.) Its decision comports with the general principle that, absent specific direction by Congress, the governmental functions of inspecting private premises and executing search warrants should be carried out by government employees only. *See Steele* v. *United States* (No. 2), 267 U.S. 505 (1925); *Bock* v. *Perkins*, 139 U.S. 628 (1891); *United States* v. *Gannon*, 201 F.Supp. 68, 73 (D. Mass. 1961). Here, there is no specific mandate from Congress in derogation of the common law. *See Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 263 (1979); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *North Pennsylvania R.R.*, 101 U.S. 557, 565 (1980).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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March 23, 1983

APPENDIX A

STAUFFER CHEMICAL COMPANY'S AFFILIATES AND SUBSIDIARIES NOT WHOLLY OWNED

Cornwall Chemicals, Limited
Derivados Macroquimicos, S.A.
Electroquimica Potosi, S.A.
Fluorex, S.A.
Halocarburos, S.A.
Industrias Quimicas de Mexico, S.A.
Industrias Quimicas Serpiol, S.A.
Kali-Chemie Stauffer G.m.b.H.
Kashima Industries Company
Limanol, S.A.
Montrose Chemical Corporation of California
Mount Pleasant Chemical Company
Pacific Chemical Industries Pty., Ltd.
Promotora, I.Q.S.A.
Quimica Lucava, S.A.
Stauffer Australia Limited
Stauffer Chemical Company (New Zealand), Limited
Stauffer Chemical Company of Wyoming
Stauffer Rioplatense S.A.I.C.
SWS Silicones Corporation
Texas Alkyls Belgium, S.A.
Texas Alkyls, Inc.
Toyo-Stauffer Chemical Co., Ltd.

Office-Supreme Court, U.S.
FILED
JUL 1 1983
ALEXANDER L. STEVAS, CLERK

No. 82-1448

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States may be collaterally estopped from litigating a question of statutory interpretation of public importance governing the relationship between a federal agency and members of a large class of businesses subject to the agency's jurisdiction by the judgment of the court of appeals for a different circuit rendered in a different case involving the same private party but arising from a separate transaction at a different location.

2. Whether a contractor, retained by the Environmental Protection Agency specifically for the purpose, qualifies as an "authorized representative" of EPA's Administrator entitled to participate in agency inspections of stationary emission sources pursuant to Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp. V) 7414(a)(2).

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1448

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 684 F.2d 1174. The court of appeals' order upon denial of a petition for rehearing (Pet. App. 42a-43a) is reported at 684 F.2d 1193. The opinion of the district court (Pet. App. 44a-56a) is reported at 511 F. Supp. 744.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a-58a) was entered on July 7, 1982, and a timely petition for rehearing was denied on October 15, 1982 (Pet. App. 42a-43a). On January 3, 1983, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including February 27, 1983, a Sunday. The petition was filed on February 28, 1983, and was granted on April 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent portions of Section 114 of the Clean Air Act, 42 U.S.C. (Supp. V) 7414 are set out in an Appendix to this brief.

STATEMENT

This case arises from respondent's challenge to use of a contractor-representative designated by the United States Environmental Protection Agency ("EPA") to provide technical assistance to EPA employees in conducting an inspection of a stationary emission source under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. (Supp. V) 7414(a)(2). The district court held that the Administrator's statutory authority to employ "authorized representative[s]" in such inspections was broad enough to permit use of such specially retained contractors. The court of appeals reversed. With each member of the panel writing separately, concurrent majorities held alternatively: (1) that the United States is collaterally estopped from advancing its interpretation of the statutory language, having lost the issue in litigation involving a different plant operated by respondent in the Tenth Circuit, and (2) that Section 114(a)(2) does not permit the agency's specially designated contractor-representatives to enter the premises of stationary emission sources for the purpose of measuring emissions from such sources.

1. In early 1980 EPA contracted with PEDCo Environmental, Inc. to assist with technical aspects of an overview inspection of an elemental phosphorus production plant operated by respondent located in Mt. Pleasant, Tennessee.[1]

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[1] The Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.*, establishes a dual state-federal system of air pollution enforcement. EPA establishes national ambient air quality standards, 42 U.S.C. (Supp. V) 7409, while the states are primarily responsible for enforcing these standards, subject to EPA's supervision and approval, 42 U.S.C. (Supp. V) 7407, 7410, 7412. In order to carry out its oversight role EPA employs its Section 114(a)(2) inspection authority to conduct an "overview inspection program" under which it inspects approximately 10% of the major stationary sources of air pollution within each state annually. These sources are also inspected by state authorities that submit reports to the EPA. The results of each overview inspection are compared with the results of the state inspection. A primary purpose of the overview inspection program is to facilitate evaluation of each state's performance in enforcing the Clean Air Act, thereby enabling EPA to determine whether additional federal enforcement effort may be warranted.

EPA officials attempted to inspect respondent's Mt. Pleasant plant on March 27, 1980. When EPA personnel, accompanied by representatives of the Tennessee Department of Public Health and PEDCo personnel retained by EPA, arrived at the plant, respondent denied entry to the two PEDCo employees. In ensuing negotiations, respondent attempted to condition admission of PEDCo personnel upon EPA and PEDCO's adherence to terms respondent had fixed. In addition to confidentiality requirements and provisions for damages in the event of any breach, the agreement proposed by respondent would have afforded it absolute authority to determine the areas of the plant to be inspected by EPA, and would have required two weeks' advance notice of any inspection (Pet. App. 6a, 45a). EPA deemed these provisions unacceptable.

Thereafter, on August 7, 1980, EPA secured a warrant from a United States magistrate authorizing inspection of respondent's Mt. Pleasant, Tennessee facility. The warrant covered inspections by EPA employees and "accompanying authorized representatives under contract to EPA." EPA and state officials, again accompanied by a PEDCo employee, again attempted to inspect respondent's Mt. Pleasant phosphorus plant pursuant to the warrant. Respondent again refused to permit a PEDCo employee to assist in the inspection of the plant unless its restrictive conditions were accepted by EPA and the contractor.

2. The following day, August 8, 1980, EPA moved to have respondent held in civil contempt by the United States District Court for the Middle District of Tennessee for its refusal to honor the warant. Respondent countered with a motion to quash the warrant. Respondent argued that Section 114(a)(2) of the Clean Air Act, which empowers the EPA Administrator "or his authorized representative" to enter upon the premises of stationary pollution sources to sample emissions, does not sanction entry by contractors retained by EPA to assist in such inspections.[2] The op-

[2] Although the statutory question had, by the date of the hearing on its motion to quash, been decided in its favor in separate litigation involving a different plant, see *In re Stauffer Chemical Co.* 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980) (first alternative holding), re-

posed applications were consolidated for hearing. On April 17, 1981, the district court denied the motion to quash. Based upon consideration of the statutory language in issue, language of related provisions of the Clean Air Act, and pertinent legislative history, the court held that the inspection authority granted to "authorized representative[s]" of the EPA Administrator by Section 114(a)(2) includes properly retained contractors (Pet. App. 44a-55a).[3] Because respondent's noncompliance with the warrant was based upon its good faith "belie[f] that private contractors were not authorized representatives" under the Clean Air Act, however, EPA's contempt motion was denied, without prejudice to its renewal in the event respondent persisted in its refusal to honor the warrant (*id.* at 56a).

3. On appeal, in addition to the merits of the question of statutory interpretation presented, respondent argued, for the first time, that the decision in *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), aff'd, 647 F.2d 1075 (10th Cir. 1981) (*"Stauffer I"*), collaterally estops the United States from contending that the term

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spondent did not argue in district court that the Wyoming district court's decision was to be given preclusive effect. A second decision, contrary to the Wyoming district court's, had, prior to submission of this case to the district court, been rendered in a case to which respondent was not a party. See *Aluminum Co. of America* v. *EPA*, No. M-30-13 (M.D.N.D. Aug. 5, 1980). After submission but prior to entry of the district court's decision in this case, a third district court decision, likewise supporting EPA's position, was rendered. *Bunker Hill Co.* v. *EPA*, Civ. No. 80-2087 (D. Idaho Oct. 15, 1980).

[3] The district court concluded that the confidentiality provisions of EPA's contract with PEDCo and PEDCo's agreement with its employees, together with the pertinent EPA regulations, were sufficient to dispel any concern about improper disclosure of proprietary business information by contractor personnel, in the absence of any evidence that PEDCo is in competition with respondent in any business (Pet. App. 53a-55a).

In the district court respondent also argued that EPA may not secure administrative warrants on an ex parte basis. The district court rejected this argument (Pet. App. 55a-56a), and although respondent preserved the argument on appeal (see *id.* at 3a), the court of appeals did not reach it. No issue respecting the procedure for issuance of a warrant is presented here.

"authorized representative" employed in Section 114(a)(2) includes a duly designated EPA contractor. Compare page 3 note 2, *supra*. *Stauffer I* addressed the legal question at issue in this case, but arose from respondent's motion to quash an administrative warrant, issued on May 8, 1980, authorizing EPA and two employees of a different contractor-representative to carry out an oversight inspection of respondent's phosphate ore processing plant in Sage County, Wyoming. The Wyoming district court had held in *Stauffer I* that Section 114(a)(2) does not authorize the EPA administrator to retain contractor personnel to assist in inspections of stationary sources of air pollutants and permanently enjoined EPA from using such contractor personnel in any inspection of any of respondent's plants located in Wyoming absent respondent's consent. Shortly after the entry of the district court's decision in the instant case, the United States Court of Appeals for the Tenth Circuit affirmed the district court's judgment in *Stauffer I*, albeit while cautioning that the issue was not "an open and shut matter" and acknowledging that under its decision the Clean Air Act is "not entirely internally consistent." 647 F.2d at 1079.

An unusually fragmented court of appeals reversed the decision of the district court in this case (Pet. App. 1a-41a). While each member of the panel concurred in the judgment, the reasoning of each judge was distinct, and each wrote separately. Judge Weick delivered what was characterized (*id.* at 1a) as the opinion of the court (*id.* at 1a-33a). But see page 6 note 4, *infra*. Although he "agree[d] with Stauffer that the action is governed by estoppel and res judicata" and that it was therefore "unnecessary to reach other issues," Judge Weick went on to reach the merits "because they were briefed by both parties," (*id.* at 4a), concluding that Section 114(a)(2) does not permit EPA contractors to participate in inspections of stationary pollution sources. Judge Jones joined only Judge Weick's discussion of collateral estoppel, stating that "the application of the doctrine precludes this Court from addressing the merits of the issue pressented" (*id.* at 34a). District Judge Siler (sitting by designation), on the other hand, joined only Judge

Weick's opinion on the merits of the statutory interpretation question, concluding that "the doctrines of collateral estoppel and res judicata should not be applied here" (*id.* at 39a). Thus both branches of Judge Weick's opinion spoke for a majority of the court, and the judgment of the court of appeals rests upon alternative holdings.[4]

a. *Collateral Estoppel*—Because "the parties as well as the issues of fact and law in the present case and *Stauffer I* were identical" (Pet. App. 11a), Judge Weick concluded that the doctrine of collateral estoppel described in *Montana* v. *United States*, 440 U.S. 147, 153-154 (1979), was controlling (Pet. App. 8a-13a). He concluded, moreover, that the "unmixed questions of law" exception to the rule of preclusion noted in *Montana* (440 U.S. at 162, quoting *United States* v. *Moser*, 266 U.S. 236, 242 (1924)) was inapposite, characterizing the case as one governed by a " 'fact, question or right distinctly adjudged' " in *Stauffer I*, rather than an application of " 'a rule of law [enunciated] * * * in a [previous] action upon a different demand' " (Pet. App. 12a-13a, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242). Finally, Judge Weick condemned the government's effort to "relitigate[ ]" (Pet. App. 12a) the issue decided in *Stauffer I* stating (*ibid;* emphasis added) that the government's persistence

> brings up the question, how many times does the government have to lose a case before either the doctrines of collateral estoppel or res judicata are applied? If we were dealing with private parties rather than the government, there would be no question about it. *If EPA really believed the decision of the Tenth Circuit in Stauffer I was wrong, it could have petitioned the Supreme Court for certiorari, but it did not avail itself of that remedy, and it is too late to do so now. EPA cannot collaterally attack the Tenth Circuit decision in the present case.*

On the other hand, Judge Siler concluded that collateral estoppel had no application in this case (Pet. App. 39a-41a). He stressed that the "federal appellate courts 'traditionally

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[4] Judge Weick's reasoning that, notwithstanding the application of collateral estoppel, the merits should be addressed was his alone.

have permitted federal agencies to relitigate substantially identical *legal* issues raised by different transactions or events, after adverse decision elsewhere' " (*id.* at 40a, quoting *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980); emphasis the Ninth Circuit's). Judge Siler also observed that the issue preclusion rule was not to be applied so as to create injustice. He explained that injustice would result from application of collateral estoppel "if EPA were precluded from entering with private contractors at Stauffer's plant in Tennessee, but were using private contractors in entering competitor's plants in the same area." (Pet. App. 40a-41a). Judge Siler concluded, moreover, that *(ibid.)*:

> where several different cases involving the same issues are being litigated simultaneously in separate circuits, collateral estoppel should not be invoked.

Judge Jones wrote separately on the collateral estoppel issue, explaining his concurrence in that branch of the court's opinion (Pet. App. 34a-38a). Judge Jones recognized (*id.* at 35a) that under *Montana* v. *United States*, *supra*, collateral estoppel is not to be applied where "controlling facts or legal principles have changed significantly" since the judgment in a prior case, or where "other special circumstances warrant an exception to the normal rules of preclusion" (440 U.S. at 155). In Judge Jones' view, however, neither of these exceptions was applicable here (Pet. App. 35a-35a). He discounted Judge Siler's concern that application of collateral estoppel would foster uneven application of the law to parties similarly situated, suggesting that application of different rules of law to respondent's facilities in different locations would create a more substantial inequity. And even though he had concluded that, given the applicability of collateral estoppel, it was improper for the court of appeals to reach the merits (*id.* at 34a), Judge Jones observed that because the other two members of the panel *had* reached the merits, the inequity that troubled Judge Siler was "illusory." He explained: "[T]he *stare decisis* impact of the Court's holding today, if it becomes final, may be expected to eliminate the practice [of contractor-assisted inspections] in this jurisdiction" (*id.* at 37a; ci-

tation omitted). Finally, while Judge Jones agreed with Judge Siler that federal agencies ordinarily should be able to litigate controlling legal issues in more than a single circuit, he thought that rule inapplicable where the non-government parties in two cases are identical, at least where "the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment" (*id.* at 37a, 38a).

b. Interpretation of Section 114(a)(2)—Writing for himself and Judge Siler, Judge Weick turned to the underlying question of statutory interpretation (Pet. App. 13a-33a). At the outset, Judge Weick acknowledged that the proper interpretation of the statute was not free from doubt, and that under his interpretation internal inconsistencies in the Clean Air Act remained (*id.* at 16a-7a).[5] He also recognized (*id.* at 15a-16a) that the decision of the Tenth Circuit in *Stauffer I* that he followed was directly contrary to the decision of the Ninth Circuit in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981). Nevertheless, Judge Weick concluded that Section 114(a)(2) of the Clean Air Act does not permit contractors designated as EPA representatives to assist agency employees in carrying out the inspections of stationary pollution sources authorized by the statute.

The court of appeals initially rejected EPA's contention that the plain meaning of the term authorized "representative" extended to contractor-representatives designated by EPA (Pet. App. 17a). The court also declined to assign any weight to Congress' adoption, in 1970, of the broad language "authorized representative" from the Senate version of the Clean Air Act Amendments bill in preference to the narrower term "officers or employees" contained in the analogous provision of the House Bill because the respective legislative reports do not address the present question. The court of appeals observed, as well, that the Conference Report made no mention of any difference between the two formulations and actually summarized the provisions of the alternative bills in nearly identical terms (*i.e.*, authorizing

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[5] Judge Siler similarly acknowledged the district court's decision on the Section 114(a)(2) issue was not clearly incorrect (Pet. App. 41a).

entry and inspection by "DHEW investigative personnel" as opposed to "DHEW personnel").[6] The court therefore concluded that Congress intended the term "authorized representative" to serve as a synonym for the terms "officers or employees" (Pet. App. 17a-20a).

In addition, the court of appeals reasoned that Section 114(d) of the Act, 42 U.S.C. (Supp. V) 7414(d), added by *1977* amendments, which requires "the Administrator (or his representatives)" to give notice to the state air pollution control agency before making an inspection under Section 114(a)(2), supports respondent's restrictive reading of the term representative as employed in the latter section. The court suggested that Congress could not have entrusted "this kind of sensitive intergovernmental communication to employees of private contractors," and concluded that the term "authorized representatives" used in Section 114(a)(2) should be given a similarly narrow reading (Pet. App. 20a-21a). The court of appeals rejected the district court's contrary observation (see Pet. App. 47a-48a) that Section 114(a)(2) should be read in conformity with Section 114(c). The court of appeals did not dispute that Section 114(c) authorizes the Administrator to disclose confidential business information learned during Section 114(a)(2) inspections to EPA contractor-representatives engaged in carrying out provisions of the Act. (Pet. App. 21a). But the court thought to harmonize all three provisions of Section 114 as follows (*id.* at 22a):

> [T]he word "representative" as used in Section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in Section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls.

The court recognized that, under its interpretation, the term representatives is used in Section 114 in two different senses, but it thought this result unavoidable (Pet. App.

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[6] At the time in question, EPA had yet to be created, and the Secretary of Health, Education, and Welfare was charged with administration of the Clean Air Act.

22a). The court also believed that if the term "representative" employed in Section 114(a)(2) denoted persons other than EPA employees, the Administrator could make inspections of stationary pollution sources *only* in person or through persons other than agency employees *(ibid.)*.

Unlike the district court (see Pet. App. 48a-50a) and the Ninth Circuit (see *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1284), the court of appeals attached substantial weight to post-enactment legislative history respecting the 1972 Amendments to the Clean *Water* Act (Pet. App. 26a-29a).[7] The court reasoned that the timing and authorship of the Senate report on Section 308 of the Water Act lent substantial authority to the views expressed respecting previously enacted provisions of the Clean *Air* Act (*id.* at 28a). In any event, the court thought it "anomalous" (*id.* at 29a) that contractor assisted inspections be permitted under the Clean Air Act, but not under analogous provisions of the Clean Water Act *(ibid.)*.

Finally, the court of appeals relied (Pet. 29a-30a) upon a 1980 amendment to inspection provisions of the Solid Waste Disposal Act, 42 U.S.C. (Supp. V) 6927(a), that added "representative[s]" duly designated by the EPA Administrator to a list of persons—including agency employees and officers—previously authorized to make such inspections. The legislative history of that amendment makes explicit Congress' intention to allow EPA contractor-representatives to take part in inspections under the Solid Waste Disposal Act. The court reasoned that the absence of comparable language in the legislative history of Section 114(a)(2) of the Clean Air Act indicates that Congress did not intend to

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[7] The pertinent portion of the Senate Report on the 1972 Amendments to the Clean Water Act, S. Rep. No. 92-414, 92d Cong., 2d Sess. 63 (1971), states:

> It should * * * be noted that the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which such representatives must be full time employees of [EPA]. The authority to enter is not extended to contractors with the EPA in pursuit of research and development

permit comparable assistance in stationary source inspections under the Clean Air Act.[8]

SUMMARY OF ARGUEMNT

I

A. It has been settled, at least since *United States* v. *Moser*, 266 U.S. 236, 242 (1924), that collateral estoppel does not apply to questions of law arising between two parties in successive, but unrelated actions. It is undisputed that the underlying issue in this case is purely legal. Yet, the court of appeals declined to apply the unmixed question of law doctrine, invoking an exception to that rule applicable to cases that are said to present the same "demand."

This court has acknowledged (*Montana* v. *United States*, 440 U.S. 147, 163 (1979)) that the scope of the *Moser* doctrine is "difficult to delineate." But this much is clear: the unmixed question of law rule, rather than the exception thereto, must apply whenever successive cases are not significantly related except for identity of parties and commonality of legal issues. Otherwise, the unmixed question of law rule would itself be swallowed by its own exception.

This case and *Stauffer I* have no significant identity beyond the common issue and parties. The two cases arise from unrelated inspections of different facilities. Moreover, the two cases arise in separate circuits, which traditionally have been permitted to develop their own views as to the law based upon the cases before them, subject only to the authority of this Court's decisions. In any event, collateral estoppel does not serve its usual purposes in a setting such as this. The more flexible doctrine of stare decisis is sufficient to assure that no improper advantages attach to redetermination of legal issues in unrelated cases, and that

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[8] The court of appeals also found inconclusive the evidence supporting EPA's contention (previously accepted by the Ninth Circuit, *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1284 n.2) that Congress had ratified the agency's interpretation of Section 114(a)(2), by its failure to disturb it in amending the Act in 1977 (Pet. App. 31a). The court also found "doubtful" indications cited by EPA that Congress had ratified the agency's position by approving appropriations for contractor assistance (*id.* at 32a-33a).

unwarranted burdens are not placed upon litigants and the courts. And there is little advantage to invocation of collateral estoppel in terms of judicial economy, where, as here, the issues are purely legal and have been addressed with differing results by other courts of coordinate authority.

B. There are especially compelling reasons to eschew application of collateral estoppel with respect to recurring questions of law in government litigation. Reliance upon collateral estoppel in such cases fails to respect the unique public interest in rigorous enforcement of acts of Congress. Because of the government's presence in all such litigation, it would also undermine the existing process of development of the public law through selective appeals and resolution of conflicts, where necessary, by certiorari, freezing the development of the law and transferring a substantial caseload from the courts of appeals to this Court. The broad rule of estoppel applied by the court of appeals also would jeopardize the government's traditional self-restraint in seeking appellate review, a practice that benefits all who vie for a place upon the necessarily limited docket of this Court.

C. The court of appeals did not quarrel directly with the foregoing principles. Rather, it seems to have assumed that they have no application when the parties to successive cases are the same. But that approach would afford a party that happened to be involved in a prior case presenting the same legal question a favored position in the administration of the law as compared with all others similarly situated. As Judge Siler recognized (Pet. App. 40a-41a), if this case were decided for respondent on the basis of collateral estoppel, respondent would have the benefit of a special rule of law inapplicable to its competitors' plants.

To be sure, refusal to apply collateral estoppel means tolerating ad interim the existence of different rules of law in different jurisdictions. But this possibility is a necessary, and fundamentally desirable, concomitant of the structure of the federal judicial system. The incidence of conflicts resulting from the operation of that system should be relatively low, moreover, for the courts of appeals remain free to give the decisions of coordinate courts such weight as

their persuasive force warrants, and this Court remains available to resolve conflicts among the circuits where necessary. And where, as here, the decisions of the courts of appeals were already in conflict before the court below rendered its decision, uniformity of decision cannot be achieved by recourse to issue preclusion.

The possible application of collateral estoppel to recurring questions of law could confound the Solicitor General's process of screening adverse decisions to determine whether further review will be sought. Particularly when the issue is whether certiorari should be sought, that decision must continue to turn upon the existence of a conflict, and the other criteria traditionally applied by this Court.

II

A. The court of appeals' interpretation of Section 114(a)(2) of the Clean Air Act is contrary to all of the pertinent indications of legislative intent. The language of the statute itself plainly extends the authority to participate in inspections to all "authorized representatives" of the Administrator; there is no hint that this authority is limited to agency employees. Moreover, this reading is strongly supported by Section 114(c) of the Act, which authorizes disclosure of information gathered in stationary source inspections to nongovernment personnel engaged in enforcement of the Act.

The court of appeals, however, read Section 114(a)(2) in conformity with what it took to be the meaning of Section 114(d) of the Act, which provides for certain intergovernmental notices. Reliance on Section 114(d) was unwarranted. Unlike Sections 114(a)(2) and 114(c), which were enacted together in 1970, subsection (d) was added in 1977. Moreover, nothing in the legislative history or language of Section 114(d) supports the restrictive reading given that section by the court below. A fortiori, the court erred in forcing Section 114(a)(2) into the mold created by its own ipse dixit respecting subsection (d). The court of appeals acknowledged (Pet. App. 22a) that it had assigned

disparate meanings to a single term—"authorized representative"—that occurs twice in Section 114. That undesirable result is entirely unnecessary.

Nor is the decision below supported by the legislative history. To the contrary, Congress adopted the broad language of Section 114(a)(2) that extends authority to all of the Administrator's authorized representatives, choosing this language, found in the Senate version of the bill, in preference to language in the House Bill that limited inspection authority to agency employees. The decision of the court of appeals thus undoes this congressional choice. That Congress' choice was deliberate is also evidenced by the retention of the narrower formulation—"officers or employees" for the motor vehicle manufacturer inspection provisions of the Act. And contrary to the view of the court below, there is nothing irrational about the distinction thus created.

The least that can be said in favor of the Administrator's interpretation is that it is wholly reasonable and is not contrary to any evidence of legislative intent. In the circumstances, the court of appeals should have deferred to the agency's interpretation of the statute. The decision below, by contrast, will handicap the agency's enforcement of the Clean Air Act, by precluding EPA from acquiring technical assistance needed to carry out inspections of the wide variety of pollution sources in the most efficient manner possible.

B. The court of appeals seems to have assumed that EPA's use of contractor-representatives entails undue risk of general disclosure of trade secrets belonging to sources subject to inspection. But Congress plainly did not share this concern; Section 114(c) authorizes disclosure of such proprietary information to agency contractors engaged in tasks requiring such access. In any event, EPA's regulations, its contract with PEDCo, and PEDCo's contract with its employees, provide confidentiality safeguards and sanctions for any improper disclosure that fully protect the interest of respondent and others similarly situated.

ARGUMENT

I. THE UNITED STATES MAY NOT BE COLLATERALLY ESTOPPED FROM LITIGATING A QUESTION OF STATUTORY INTERPRETATION BY THE ADVERSE JUDGMENT OF THE COURT OF APPEALS FOR A DIFFERENT CIRCUIT IN AN UNRELATED CASE

A. Collateral Estoppel is Inapplicable to an Unmixed Question of Law Arising in Successive Cases Related Only by the Presence of that Question and the Presence, in Each, of the Party Invoking the Rule of Preclusion

The court of appeals held that "[s]ince the parties as well as the issues of fact and law in the present case and *Stauffer I* [are] identical" (Pet. App. 11a), the doctrine of collateral estoppel described in *Montana* v. *United States*, *supra*, 440 U.S. at 153-154, controls the result here (Pet. App. 8a-12a). In the court of appeals' view, "there [wa]s no valid reason" (*id.* at 12a) why it should be required to address the merits of the parties' dispute in the case. In our view, however, this case is governed by the exception to the rule of collateral estoppel applicable to pure questions of law arising in successive actions on substantially unrelated claims.

1. The Court defined the "unmixed question of law" exception to the rule of collateral estoppel in *Montana* v. *United States*, *supra*, 440 U.S. at 162, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242 (emphasis added by the *Montana* Court):

> Where * * * a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

So, also, the *Restatement (Second) of Judgments* § 28, at 273-274(1982), provides in pertinent part:

> Although an issue is actually litigated and determined by a valid and final judgment * * * relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

* * * * *

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated * * *.

The underlying question presented in this case is a pure question of law entailing only an interpretation of Section 114(a)(2) of the Clean Air Act. The district court and the court of appeals below agreed that the ultimate inquiry was one of congressional intent. See Pet. App. 13a, 46a. And both courts undertook to resolve that question by recourse to the conventional tools of statutory interpretation: statutory language, legislative history, examination of related or analogous language, and canons of construction. Similarly, both the Ninth Circuit and the Tenth Circuit have uniformly treated the question as one of purely legal dimensions. See *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1282-1284; *Stauffer I*, *supra*, 647 F.2d at 1077-1079. And we must suppose that the court below shared that view since it suggested (Pet. App. 12a) that the government, if dissatisfied with the Tenth Circuit's decision in *Stauffer I*, should have sought this Court's review of the Tenth Circuit's judgment.

2. The court of appeals noted (Pet. App. 12a) this Court's caution that the "unmixed question of law" doctrine does not apply in successive actions "*upon * * * different demand[s]*" and does not permit

> *a fact, question* or *right* distinctly adjudged in the original action [to] be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of law.

Montana v. *United States*, *supra*, 440 U.S. at 162, quoting *United States* v. *Moser*, *supra*, 266 U.S. at 242 (emphasis the *Montana* Court's). But the court below did not explain *why* this case fell outside the unmixed question of law doctrine as thus limited. Rather, the court stated summarily (Pet. App. 12a-13a):

> Since the fact, question or right in the present case was distinctly adjudged in *Stauffer I* the exception in *Moser* is inapplicable here.

As this Court recognized in *Montana* (440 U.S. at 163), "the scope of the *Moser* exception may be difficult to delin-

eate * * *." And commentators have agreed that the line between (permissible) relitigation of a common question of law arising in successive actions and impermissible relitigation of "a fact, question or right" previously adjudged is not a clear one. See *Restatement (Second) of Judgments* § 28, comment c, at page 277; *id.* at 286 (Reporter's Note). But unless the unmixed question of law rule is entirely to be abolished, a determination that successive actions present the same "demand," turn upon the same "fact, question or right," or are not "substantially unrelated," must rest upon something more than an identity of parties and of legal issues—for those factors are necessarily present whenever the predicate for application of the *Moser* doctrine exists in a case litigated between parties that have previously litigated a legal question. See *Restatement (Second) Judgments* § 28, Reporter's Note at 286 (collateral estoppel disfavored when two claims arise from "unrelated event[s] or subject matter").[9]

Yet the court of appeals identified no other respect in which this case is related to *Stauffer I*, and appears to have relied entirely upon the identity of parties and the common legal question. See Pet. App. 11a-12a. In fact, *Stauffer I* and the present suit are related in no other way. The two cases arise out of different transactions—entirely unrelated inspections of different industrial facilities that were to be conducted with the assistance of different contractor-representatives. The two facilities are located in different states, and different EPA administrative regions. Each inspection

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[9] *Moser* was decided long before the strict rule of mutuality of estoppel began to be eroded. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979); *Bernhard* v. *Bank of America Nat'l Trust & Savings Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942); compare *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), with *Triplett* v. *Lowell*, 297 U.S. 638 (1936). The effect of the court of appeals' decision is thus to abolish the unmixed question of law rule announced in *Moser*. Of course, now that the mutuality requirement has been relaxed, the unmixed question exception necessarily extends to situations where the parties in successive actions are not the same. See Br. for the United States, at 20-25, *United States* v. *Mendoza*, No. 82-849 (cert. granted, Jan. 24, 1983) [redacted] (see page 22 note 12, *infra*).

arose out of the routine operation of EPA's oversight inspection program. And so far as we are aware (and respondent has not claimed otherwise) the fact that both inspections involve plants operated by respondent is pure coincidence. See page 21 note 11, *infra*. The attempt to inspect respondent's Mt. Pleasant, Tennessee facility commenced *before* the agency's attempt to inspect the Sage County, Wyoming plant. The cases arose on separate motions to quash two different search warrants issued by different federal courts. Thus, wherever the boundary of the unmixed question of law exception may lie, this case falls comfortably within it.[10]

For purposes of applying the unmixed question of law rule, it is also significant that this case and *Stauffer I* arose in different judicial circuits, which by tradition "can, and do, differ in their conclusions as to the law." *Frock* v. *United States Railroad Retirement Board*, 685 F.2d 1041, 1046 (7th Cir. 1982). See *American Medical International, Inc.* v. *Secretary of HEW*, 677 F.2d 118, 123 (D.C. Cir. 1981); see Vestal, *Relitigation by Federal Agencies: Conflict, Concurrency and Synthesis of Judicial Policies*, 55 N.C.L. Rev. 123, 140-163 (1977). This Court has repeatedly recognized the value of independent consideration of legal issues by the various courts of appeals. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979); *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.20 (1977).

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[10] The examples employed in the *Restatement* to illustrate the scope of the unmixed question exception are illuminating. In successive actions for trademark infringement for consecutive time periods between identical parties, a judgment in the first action that the mark is invalid because of widespread generic usage is said to be conclusive on the same issue in a second action. By contrast, in successive personal injury damage actions against a municipality brought by a single plaintiff based on separate tortious acts, a judgment for the municipality on sovereign immunity grounds in the first action does not bar the plaintiff from arguing in the second (subject only to the constraints of stare decisis) that sovereign immunity should be rejected. *Restatement (Second) Judgments* § 28, illustrations 1 and 2 at 276. In functional terms this case resembles the later example, rather than the former, for the only identity between this case and *Stauffer I* lies in the identity of the parties and the legal issue.

Indeed, this Court's practice in exercising its certiorari jurisdiction assumes the recurrence of conflicting legal conclusions by those courts. Sup. Ct. R. 17.1. Yet, under the collateral estoppel rule adopted below, this Court, also, could be precluded from resolving such a conflict after it had arisen. Thus, it is especially inappropriate to treat cases arising in different judicial circuits that are linked only by commonality of parties and a purely legal issue as related for this purpose. See *Restatement (Second) of Judgments* § 28(3), at 273 (litigation not precluded when a "new determination of the issue is warranted by * * * factors relating to the allocation of jurisdiction" between two courts).

3. A comparison of this case with *Moser* confirms that the court of appeals misapprehended the distinction contemplated in *Moser*. To be sure, *Moser* itself was held to be controlled by the general rule of preclusion, rather than by the unmixed question of law exception to that rule recognized in the Court's opinion. 266 U.S. at 242. But the successive "demands" in *Moser* were claims for successive installments of a pension. *Id.* at 240. The transactions and facts underlying the successive actions were thus identical. Moreover, the consecutive actions all arose in the same court. Assuming no statute of limitations problems, if Moser had been content to bide his time, his successive claims could have been brought in a single action. Here, by contrast, the two cases arise from distinct transactions and neither of the two district courts had jurisdiction to entertain an application to quash the warrant issuing from the other. The question in *Moser*, moreover, was highly fact-bound, if not a mixed question of law and fact. As stated by the Court (266 U.S. at 242):

> [t]he question expressly and definitely presented in this suit is the same as that definitely and actually litigated in the * * * preceding suits, viz: whether [Moser] occupied the status of an officer who had served during the civil war.

Here on the other hand, the issue is purely one of law and does not turn in any respect upon the application of general principles to specific factual situations. Accordingly, this

case, unlike *Moser* itself, is governed by the unmixed question of law exception to collateral estoppel.

Nor, contrary to the view of the court of appeals, is this case controlled by the *holding* of *Montana*. There, as in *Moser*, the Court found the unmixed question of law exception inapplicable, observing: "the legal 'demands' of this litigation are closely aligned in time and *subject matter* to those in [the prior case]." 440 U.S. at 163 (emphasis added). But *Montana* demonstrates that a significant identity between successive cases in respects other than the parties and the legal issue must be found before a judgment on a question of law in the earlier case will be held to give rise to an estoppel in the latter case. In addition to identity of parties and issue, each of the successive actions considered in *Montana*, was a challenge to the application of a given state tax provision to federal contractors in Montana. The two cases were filed nearly simultaneously to vindicate the position of a single federal contractor, arising out of the contractor's activities in connection with a single federal dam project. Thus, the successive actions considered in *Montana* were related in substantial respects that have no analogue in this case.

It may also have been appropriate to treat the successive actions in *Montana* as arising from a single "demand" because there the government had engaged in conduct that may have implicated the core concerns underlying the preclusion doctrine. The United States had litigated the issue to a conclusion in the Supreme Court of Montana, noted an appeal to this Court, then dismissed the appeal and pursued a parallel action in the federal district court. The federal action, moreover, was filed just after the action in state court had been filed, and was stayed upon the government's stipulation pending resolution of the state court ligitation. Here, by contrast, the government made no such tactical decision to engage in duplicative litigation. Rather, these two cases arise from respondent's motions to quash separate search warrants that were routinely sought in the agency's performance of its statutory duty to enforce the Clean Air Act through the Section 114(a)(2) oversight inspection program. See page 17-18, *supra*. And respondent

invoked collateral estoppel for the first time upon *its* appeal from the district court's decision in this case upholding the agency's reading of Section 114(a)(2).[11]

4. In treating this case as one presenting the same "right or question" as that adjudicated in *Stauffer I*, the court of appeals failed to consider whether application of collateral estoppel was warranted in light of the twin purposes served by the preclusion doctrine: "protecting litigants from the burden of relitigating an identical issue with the same party or his privy" and "promoting judicial economy." *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 326. At first galance, the first of these purposes might appear to be served by the court of appeals' decision. But, as is explained above, this case does not entail the "harassment of [an] adverse party" (*Restatement (Second) Judgments*, § 28, Reporter's Note at 286) that the rule was designed to prevent. Of course, if the mere possibility of redetermination of a legal question were prohibited, there could be no exception for unmixed questions of law. But where, as here, two actions lack any substantial relationship other than identity of parties and legal issue, the unmixed question of law doctrine reflects the view that "the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens" while allowing for desirable development of the law. *Restatement (Second) Judgments*, § 28, comment b at 275-276.

Nor was judicial economy served by the court of appeals' approach. As a general matter, because the issue was purely legal, no trial type proceedings, or even elaborate factual submissions by affidavit, were needed to decide the parties' contentions. And the labor of deciding the legal question was substantially reduced because the issue had been fully addressed in the conflicting opinions of the Ninth and Tenth

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[11] Thus, there is no basis whatever for Judge Jones' suggestion (Pet. App. 38a) that EPA has deliberately embroiled respondent in multiple litigation in order to "test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment."

Circuits, as well as in the opinion of the district court below. Thus, no substantial economy of judicial resources could have been achieved by resort to collateral estoppel. In any event, because a majority of the court of appeals actually reached the merits, collateral estoppel had none of the salutary effects usually assigned to the doctrine. The merits were briefed, argued, and decided. Neither the court of appeals, nor any of the parties was spared any labor or expense associated with a decision on the merits. See page 29 note 15, *infra*.

B. Collateral Estoppel Should Not Be Applied Against The Government To Preclude Determination Of Recurring Questions of Public Law

Any ambiguity in the application of the *Moser* exception to the issue preclusion doctrine is removed by consideration of the additional circumstances that set this case apart from *Montana*. As the Court there recognized, collateral estoppel is inapplicable whenever "special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155. See also *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 331. We submit that the special attributes and role of the United States as a litigant strongly militate against application of the issue preclusion doctrine to the government, particularly when it is engaged in the uniquely sovereign function of enforcing the public law that governs the legal relationships of federal agencies with broad classes of similarly situated persons or businesses.[12]

1. First, unlike cases involving only private litigants, application of the issue preclusion doctrine in cases involving the United States must take account of the unique public interest in the uniform and rigorous enforcement of laws of

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[12] Because neither the court of appeals nor respondent appears to have quarreled with this general proposition, but only with its application to issues previously litigated between the same parties (see page 26, *infra*), and because the broader question is fully addressed in our brief in *United States* v. *Mendoza*, No. 82-849 (at pages 25-36), which presents a closely related question, we present this argument in somewhat abbreviated form here. A copy of our brief in *Mendoza*, to which we refer the Court, has previously been provided to counsel for respondent.

general importance and applicability. See *Standefer* v. *United States*, 447 U.S. 10, 24-25 (1980). The fact that this case, unlike *Standefer*, is not a criminal prosecution does not dilute the strength of the policy considerations there recognized. Whenever the government acts in its sovereign capacity to enforce the public laws, public policy dictates the applicability of the *Standefer* analysis. As the Court emphasized in *INS* v. *Hibi*, 414 U.S. 5, 8 (1973): "[T]he Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress." Rather, the government "is enforcing public policy established by Congress." *Ibid.*

Significant practical and legal considerations, applicable in criminal and non-criminal cases alike, also set the United States apart from any other litigant and argue strongly against the estoppel invoked by the court of appeals. First, the government is involved in far more litigation than any other party. Second, many of the issues of greatest public importance arise only in litigation to which the government is a party; others are characteristically associated with government litigation. See *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 121 n.24. Third, the government, unlike other litigants, necessarily finds itself in litigation presenting a particular legal issue in a host of jurisdictions. In such cases, which include the present one, there is special potential for unfairness in the application of the issue preclusion doctrine to questions of law for there is substantial likelihood that in litigating a recurring issue, the government will at some point encounter an adverse decision.

Because of these unique attributes of government litigation, application of collateral estoppel in the circumstances of cases such as the present one would substantially disrupt the existing process of development of the public law. For better or for worse, courts of coordinate rank are not bound by each other's decisions on questions of law, even as a matter of stare decisis (see page 18, *supra*) and, in practice, often disagree. The upshot is that the law emerges through the hierarchical process of appeal, en banc review and, in proper cases, certiorari.

Issue preclusion in private litigation—even if extended to legal questions—ordinarily does not unduly undermine this process of development of the law because no single litigant is party to more than a small fraction of factually unrelated cases presenting a common legal question. By contrast, the government is characteristically, if not invariably, a party to litigation on public law questions. Accordingly, application of collateral estoppel when the government has unsuccessfully litigated a question of law in any court inferior to this one would freeze the development of the law.

2. Invocation of collateral estoppel against the government on recurring questions of public law is inappropriate for the additional reason that the government, through the Office of the Solicitor General, employs a unique formal mechanism for determining whether to take an appeal from or seek certiorari review of an adverse judgment. See 28 C.F.R. 0.20. This process is uniquely selective, particularly at the certiorari stage. Moreover, to a degree not approached by any private party, the government regularly takes into account factors other than its parochial interest in prevailing in a particular lawsuit in determining whether to seek further judicial review. As a result, the Solicitor General frequently decides against appeal or certiorari in cases where the legal conclusions of the deciding court are believed to be erroneous. Such decisions rest upon a host of other considerations, including: a substantial measure of prosecutorial discretion, equitable and policy considerations, the perceived practical importance of the decision, recognition of the limited resources of the government, sensitivity to the crowded dockets of the courts, and, in the case of applications for further review in this Court, the Court's announced criteria for granting certiorari. Because of the substantial volume of government litigation, and the substantial share of this Court's limited docket already occupied by government cases, self-restraint is particularly necessary in connection with filing of petitions for a writ of certiorari.

This case well illustrates these consideration. The court of appeals faulted the government for its failure to seek

certiorari review in *Stauffer I* (Pet. App. 12a). But at the time a petition could have been filed there was no conflicting decision of any court of appeals. Moreover, the pendency in the Ninth Circuit of *Bunker Hill*, an appeal from a district court decision favorable to the government, as well as the pendency of respondent's appeal to the Sixth Circuit from the district court's decision favorable to the government in this case, necessarily counseled against application to this Court for further review in *Stauffer I*. Any other course would have ignored this Court's announced certiorari practices, see Sup. Ct. R. 17.1(a), and would have disserved both the Court and those litigants who compete for a place on its crowded docket.[13]

The government's practice of selective pursuit of appellate review benefits the public interest and facilitates sound judicial management. Adoption of the preclusion rule applied by the court of appeals would compel the United States to reconsider this salutary practice. Instead, the government would be obliged to consider an inflexible policy of appealing (and even seeking certiorari on) the first adverse decision rendered on a legal issue. As a result, the courts of appeals and this Court especially would be burdened prematurely and unnecessarily, and judicial economy—the touchstone of the preclusion doctrine—would be disserved. Moreover, because of the limited docket of this Court, and the proliferation of statutes and litigation in recent years, constructions of the law that this Court might ultimately determine to be erroneous would more often be given finality. Plainly, there is no interest served by invo-

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[13] We are puzzled as to what significance the court of appeals would have attached to a denial of certiorari had the government filed a petition in *Stauffer I*. Treating a denial of certiorari as confirming the preclusive effect of a court of appeals' judgment would be in tension with the traditional rule that a denial of certiorari has no precedential effect and would burden this Court's decisions respecting grant of certiorari with unwarranted consequences. But a rule that denial of certiorari would relieve a party of the preclusive effect of an adverse court of appeals' judgment would create an inappropriate incentive for filing of petitions that do not conform to the Court's criteria for review.

cation of collateral estoppel in the circumstances of this case that would justify these detrimental consequences.

3. The courts of appeals generally have recognized that these considerations preclude application of collateral estoppel to the government on recurring legal issues. *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 121-124; *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980); *Olegario* v. *United States*, 629 F.2d 204, 215 (1980); *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974). The American Law Institute also has recognized that preclusion is inappropriate when

> The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based * * *.

Restatement (Second) of Judgments § 29(7). Thus, when "the party against whom the rule of preclusion is to be applied is a government agency responsible for continuing administration of a body of law applicable to many similarly situated persons * * * the rule of preclusion should ordinarily be superseded by the less limiting principle of *stare decisis*." *Id.* at § 29 comment i; see also *id.* at § 28(2) & comment c.

C. Identity of Parties in Successive Cases Does Not Justify Application of Collateral Estoppel on Recurring Questions of Public Law

The court of appeals evidently concluded that the foregoing principles had no application in the setting of this case because respondent was the party adverse to the government in *Stauffer I* as well as in the present case (Pet. App. 11a, 12a-13a (opinion of Weick, J.); *id.* at 37a-38a (opinion of Jones, J.)). Respondent, too, appears to rely upon that distinction. Memo. in Opp. 7, 8-9 & n.11.

1. Like respondent (Memo. in Opp. 7), we acknowledge that, even after the demise of the strict rule of mutuality of estoppel (see page 17 note 9, *supra*), identity of parties remains a relevant consideration in applying collateral estoppel to particular cases. When issues are litigated between parties that have previously litigated them, a party ordinarily cannot claim surprise when it finds itself bound

by pertinent determinations necessary to a judgment rendered against it, even on a different cause of action, if neither the factual nor the legal setting has changed in the interim. See *Montana* v. *United States*, *supra*, 440 U.S. at 158-162; *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 667 F.2d at 121 n.24, 124 & n.46. Even so, as explained above (pages 15-22), invocation of collateral estoppel to govern unmixed questions of law arising in factually distinct cases remains inappropriate, and in such cases the alternative doctrine of stare decisis is a sufficient bulwark against repeated litigation and undue demands upon judicial resources. But the factors that counsel against application of collateral estoppel to unmixed questions of law apply with special force in government litigation where, as here, the issue is a recurring one of public law that applies to a significant class of similarly situated persons. In such cases, resort to collateral estoppel would improperly afford the party that happened to be involved in the prior case decided against the government a favored position in the administration of law. As Judge Siler explained below (Pet. App. 40a-41a):

> Here, injustice would result if EPA were precluded from entering with private contractors at Stauffer's plant in Tennessee, but were using private contractors in entering competitors' plants in the same area.

The undesirability of applying collateral estoppel in this setting has been recognized by commentators. As the American Law Institute has stated (*Restatement (Second) of Judgments*, § 28):

> [R]elitigation of [an] issue [previously determined] in a subsequent action between the parties is not precluded [when]:
>
> * * * * *
>
> (2) The issue is one of law and * * * a new determination is warranted in order to * * * avoid inequitable administration of the laws * * *.

In this connection the authors of the *Restatement* explain (*id.* at comment c, at 278):

> [I]t can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of

> the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of current law.

Accord: *American Medical International, Inc.* v. *Secretary of HEW*, *supra*, 677 F.2d at 124. As Judge Siler appreciated, this case is a striking example of the problem recognized by the *Restatement*. This case arises from EPA's Region IV, one of 10 such administrative units. Approximately 4600 major stationary pollution sources subject to inspection under the "overview inspection program" are located in eight state areas encompassed in Region IV alone (Pet. App. 59a). Roughly 10% of these sources are likely to be inspected annually under this program. Thus, on a nationwide basis, thousands of businesses are affected each year by the question of contractor participation in Section 114 inspections. It accordingly would be anomalous indeed to create—through invocation of collateral estoppel—a special private law applying to respondent alone on this question of statutory interpretation.

Contrary to Judge Jones' suggestion (Pet. App. 36a), it is no answer to observe that refusal to apply collateral estoppel will entail a different kind of disparity in the application of the laws—one that depends upon geography. First, the doctrine of stare decisis and the persuasive force of the decision of courts of coordinate or inferior rank will, in the long run, at least, minimize such "inequities." And it is uniquely the province of this Court to act as final arbiter of any issues that divide the courts of appeals. The short-term unevenness of result permitted by redetermination of recurring questions of public law by coordinate courts is, moreover, essentially inoffensive. It is a natural result of the operation of a system of lower courts with limited geographic jurisdiction, and a Supreme Court with control over its limited docket.

On the other hand, application of different rules of law to persons similarly situated resulting from collateral estoppel is in tension with fundamental values of equal justice. Compromise of those values is ordinarily warranted by the competing desiderata of judicial economy, protection of par-

ties against multiple lawsuits, and the role that issue preclusion plays in minimizing inconsistent judgments. See *Montana* v. *United States*, *supra*, 440 U.S. at 153-154. But as we have explained above (pages 21-22), none of these competing objectives is advanced by application of collateral estoppel in a setting such as the present one. And where, as here, the decision afforded preclusive effect is itself inconsistent with the decision of another court of coordinate rank, invocation of collateral estoppel plainly cannot eliminate inconsistent judgments. The burden of multiple lawsuits, moreover, is a significantly less weighty consideration where, as here, multiple litigation arises from a federal agency's duty to apply a uniform interpretation of a statute applicable to a host of similarly-situated parties. By engaging in a regulated business within the various judicial circuits, each of which is ordinarily free (subject only to this Court's decisions) to interpret statutes for itself, respondent subjected itself to the possibility that it would become engaged in parallel litigation presenting a common legal question (see pages 17-18, and page 21 note 11, *supra*). [14] Thus, the inequity that would result from application of collateral estoppel in this case is substantially more troublesome from the point of view of the fair administration of justice than the possibility of conflicts among the circuits perceived by Judge Jones.[15]

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[14] We note that respondent operates plants in 30 states, spanning 11 of the 12 judicial circuits. See [redacted] 2 Moody's Industrial Manual 5985 (1982). Because 10% of major pollution sources are inspected by EPA annually (see page 2 note 1), it is not in the least remarkable that respondent has encountered the legal issue presented here more than once. Eighteen of respondent's plants are located within the Ninth Circuit. Query whether under the Sixth Circuit's analysis EPA is obliged to follow *Stauffer I* with respect to these plants, notwithstanding the Ninth Circuit's contrary decision in *Bunker Hill*. If so, the resulting discrepancy in the administration of the laws is substantial indeed.

[15] Nor does Judge Jones' suggestion (Pet. App. 37a) that the inequity produced by application of collateral estoppel is illusory here because a majority of the court reached the merits, *support* the application of collateral estoppel. Because a majority of the court of appeals relied upon collateral estoppel, there was no reason for the court to reach the merits. See *Montana* v. *United States*, *supra*, 440 U.S. at

2. The fact that the parties in this case and *Stauffer I* are identical cannot justify application of collateral estoppel for yet another reason. At the time when the Solicitor General decides whether to authorize an appeal, or whether to seek review in this Court of an adverse judgment, it typically is impossible to determine whether future litigation will arise in a case involving the same party or a different party. The Solicitor General's decision—particularly respecting whether to seek certiorari—must turn instead upon the general importance of the issue, the existence of a conflict and the other criteria traditionally applied by this Court. If the United States is to be bound in future litigation with the adverse party, however, the mere possibility of future litigation with the same party militates powerfully in favor of further review in many cases that otherwise do not warrant that extraordinary step.

3. We have already explained (pages 20-21) why this case is not controlled by the holding of *Montana* v. *United States*, *supra*. We add here only that the Court's decision in *Montana* cannot be understood to discount the policy and practical considerations we have outlined that affect issue preclusion in government litigation. These factors had little application in *Montana*. The issue presented there could arise only in two forums (setting to one side this Court's original jurisdiction)—the Montana state courts and the United States District Court for Montana. There thus was little basis for concern respecting impairment of the development of the law. And because the record reflected a deliberate effort to pursue parallel litigation on indistinguishable claims (see page 20, *supra*), there was less reason to defer to the Solicitor General's selective appeal policy. More importantly, perhaps, the underlying legal question presented, while of undoubted importance to the United States, did not affect a class of similarly situated persons, but only the proprietary interests of the litigants. There

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152-153; cf. *Bowen* v. *United States*, 422 U.S. 916, 920 (1975). Conversely, because a separate majority reached the merits, invocation of collateral estoppel could have none of the salutary effects assigned for the doctrine generally. See page 21-22, *supra*.

was accordingly no occasion for the United States to argue in *Montana*, as it does here, that the application of the preclusion doctrines was inappropriate in light of the government's special attributes and responsibilities. The Court's opinion thus does not reflect any view adverse to our present contentions.

D. Other Considerations Weigh Against Application of Collateral Estoppel in the Setting of this Case

Two other factors militate against the estoppel recognized by the court of appeals. First is the Ninth Circuit's decision in *Bunker Hill Co.* v. *EPA*, *supra*, that conflicts with *Stauffer I*.[16] *Parklane Hosiery Co.* v. *Shore*, *supra*, 439 U.S. at 330 & n.14. In view of the conflicting precedents that confronted it, the court of appeals should simply have given each decision of a coordinate court such persuasive force as it warranted, rather than resorting to the rigid artificial rule of collateral estoppel to elevate one of those prior decisions above the other.

Reliance upon collateral estoppel with respect to legal issues is, moreover, particularly inappropriate in the context of the difficult questions of statutory interpretation that arise under our complex environmental laws. See, *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 & n.26 (1977); *Western Oil & Gas Ass'n* v. *EPA*, *supra*, 633 F.2d at 808. This Court frequently has entered into such controversies only after a substantial accumulation of appellate jurisprudence. See, *e.g.*, *Union Electric Co.* v. *EPA*, 427 U.S. 246, 254-255 (1976); *Train* v. *NRDC*, 421 U.S. 60, 72-75 (1975). This practice may be based in part upon the provisions of the major environmental statutes assigning jurisdiction to address certain claims upon a geographical basis, while others are treated as matters of national concern. See, *e.g.*, 33 U.S.C. 1369(b) (Clean Water Act); 42 U.S.C. (Supp. V) 7607(b)(1) (Clean Air Act).[17] But

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[16] See also pages 3-4 note 2.

[17] On those rare occasions when Congress has wished to make the decision of a single court of appeals respecting a particular issue final save only for review by this Court, it has done so explicitly, by desig-

even where such explicit statutory provision is not made, questions of law under the environmental control statutes are capable of arising in every jurisdiction. It appears particularly inappropriate to import the rigid issue-preclusion doctrine into this area in a fashion that would undercut the traditional independence of the circuits. Moreover, because of the prominent role in environmental litigation of large industrial corporations, national trade associations and national environmental advocacy groups, many of which do business or conduct litigation in manifold jurisdictions, any rule that assigns controlling weight to the identity of parties in determining the applicability of collateral estoppel in this setting provides an undesirable incentive for forum shopping, and also fosters indefensible inequities in the administration of the law to similarly-situated parties.[18]

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nating a single forum for litigation of questions of nationwide importance. In addition to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. V) 7607(b)(1), see Section 211(b)(1) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note. Cf. Section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. V) 1276(a)(1).

[18] By way of illustration, we note that United States Steel Corporation challenged the EPA's failure to comply with the notice and comment requirements of 5 U.S.C. 553 in promulgating final rules designating various areas as exceeding national ambient air quality standards for total suspended particulates in the Fifth Circuit, *United States Steel Corp.* v. *EPA*, 595 F.2d 207, modified, 598 F.2d 915 (1979), the Seventh Circuit, *United States Steel Corp.* v. *EPA*, 605 F.2d 283 (1979), cert. denied, 444 U.S. 1035 (1980), and in the Eighth Circuit, *United States Steel Corp.* v. *EPA*, 649 F.2d 572 (1981). Other companies challenged the EPA's procedure in the Third Circuit, *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377 (1979), the Sixth Circuit, *Republic Steel Corp.* v. *Costle*, 621 F.2d 797 (1980), the Ninth Circuit, *Western Oil & Gas Ass'n* v. *EPA*, *supra*, and the District of Columbia Circuit, *New Jersey Department of Environmental Protection* v. *EPA*, 626 F.2d 1038 (1980). It would have been anomalous in the extreme for the result in any of those cases to have turned upon the presence or absence of a particular party—United States Steel.

II. UNDER SECTION 114(a)(2) OF THE CLEAN AIR ACT, A CONTRACTOR DESIGNATED AS AN "AUTHORIZED REPRESENTATIVE" BY THE EPA ADMINISTRATOR MAY PARTICIPATE IN AGENCY INSPECTIONS OF STATIONARY AIR POLLUTION SOURCES

Section 114 of the Clean Air Act was originally enacted in 1970 as part of the comprehensive Clean Air Amendments of that year, 84 Stat. 1687-1688, to the pre-existing federal air pollution legislation. Section 114(a), which remains today substantially in the form enacted in 1970, advances the congressional purpose "to protect and enhance the quality of the Nation's air resources" (42 U.S.C. (Supp. V) 7401(b)(1)), in two important respects. Section 114(a)(1) authorizes EPA to require owners or operators of stationary emission sources to carry out a program of emission monitoring and to maintain emission records. Section 114(a)(2) empowers "the Administrator or his authorized representative, upon presentation of his credentials "to enter upon the premises of such an operator to copy records, inspect monitoring equipment or sample emissions." The issue in this branch of this case is simply whether, as the court of appeals held (Pet. App. 33a) "the words 'authorized representative' in Section 114(a)(2) * * * mean officers or employees of the EPA, and cannot include employees of private contractors."

A. Statutory Language and Legislative History Indicate That the Administrator is Authorized to Secure Contractor Assistance for Stationary Source Inspections

1. We began with the language of the statute directly in issue. See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Section 114(a)(2) empowers "the Administrator or his authorized representative" to enter upon the site of a stationary pollution source for the purpose of sampling emissions. Because the term "authorized representative" is nowhere defined in the Clean Air Act, there is no reason to believe that Congress intended that it be assigned a special limited meaning. Rather, the statutory terms should be assigned "their usual and ordinary sense" (*Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917)).

As the Ninth Circuit observed in *Bunker Hill Co.* v. *EPA*, *supra*, 658 F.2d at 1283, the common understanding of the terms employed by Congress in Section 114(a)(2) compels the conclusion that a duly designated contractor qualifies to participate in an EPA stationary source inspection. The dictionary teaches that "authorize" means "to endow with authority or effective legal power" and that "authorized" means "endowed with authority." *Webster's Third New International Dictionary* 146, 147 (1976).[19] A "representative" is one who "respresents another as agent, deputy, substitute or delegate, usu[ally] being invested with the power of the principal." *Id.* at 1926-1927. The term representative is thus defined in functional terms, resting upon the concept of agency, and does not carry any implication of an employment relationship. Accordingly, a contractor specially retained by the EPA Administrator for the purpose of providing technical support to agency employees in a stationary source inspection qualifies as an "authorized representative" and may participate in the inspection.[20]

2.a. As the district court recognized, consideration of related provisions of the Clean Air Act supports the agency's interpetation of Section 114(a)(2). The district court observed (Pet. App. 47a-48a):

> Section 114 contains two references to "authorized representatives." In addition to subsection (a)(2), sub-

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[19] There is no question in this case as to whether the Administrator duly authorized PEDCo personnel to participate in the inspection of respondent's premises or whether that authorization was evidenced by credentials carried by the PEDCo personnel.

[20] Indeed, the court of appeals acknowledged (Pet. App. 22a) that "the plain meaning of 'representative,' " is "one standing or acting for another through delegated authority," but declined to apply that plain meaning in this case. See page 39, *infra*.

Comparison of this case with *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), is instructive. There the court held that certain employer-selected trustees of union pension fund are not "representatives" of the employer for specified purposes under the National Labor Relations Act because the trustees' duties were inconsistent with any notion that they served as agents of the employer's interests. *Id.* at 329-330, 332-334.

> section (c) allows confidential information obtained under subsection (a) to be disclosed to "other *officers, employees, or authorized representatives* of the United States concerned with carrying out this Act." 42 U.S.C. § 7414(c) (emphasis added). That Congress intended authorized representatives to be distinguishable from officers and employees is obvious from the disjunctive listing in this section. If authorized representatives were limited to officers or employees, the inclusion of authorized representatives in this subsection would have been mere surplusage. The Court will not conclude that Congress intended to be redundant.

The district court (and the court of appeals) correctly appreciated that Section 114(c) necessarily sanctions disclosure of information gathered in inspections to designated agency contractors for use in the performance of their duties, for the use of the disjunctive "*or*" clearly indicates that Congress extended this authority beyond officers and employees of the United States. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338-339 (1979).[21] There is simply no reason to believe that Congress intended to assign the term "authorized representative" a different meaning in Section 114(a)(2), for the two provisions are intimately related and were enacted simultaneously. Such an intent is not to be attributed to Congress absent compelling support in legislative history and only in circumstances where a consistent interpretation of the statutory language leads to "absurd or futile results." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980), quoting *United States* v. *American Trucking Assn's*, 310 U.S. 534, 543 (1940).[22]

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[21] Respondent appears to suggest (Memo. in Opp. 12 n.16), halfheartedly, that Section 114(c) may be intended to cover "federal judges, attorneys at the Department of Justice and U.S. Attorneys, and Coast Guard officers and officials." But all of the persons suggested are officers and employees of the United States. Even if it were assumed that federal judges were not to be treated literally as officers of the United States, Section 114(c) separately authorizes disclosure of inspection data "when relevant in any proceeding" under the Clean Air Act. Plainly, Section 114(c) must extend to persons other than government employees.

[22] We note that, contrary to the court of appeals' suggestion (Pet. App. 22a), an interpretation of the term "representative" employed in

b. Instead of interpreting Section 114(a)(2) in conformity with the plain meaning of the identical language of Section 114(c), the court of appeals unaccountably focused upon Section 114(d) of the Clean Air Act, which requires "the Administrator (or his representatives)" to provide reasonable notice to the concerned state air pollution control agency before carrying out an inspection under Section 114(a)(2) in certain circumstances. The court of appeals reasoned (Pet. App. 20a-21a) that giving the notice required by Section 114(d) entails "sensitive intergovernmental communication" that Congress simply could not have intended to entrust to private contractors. That analysis, however, is flawed in numerous respects. First, Section 114(d) was added to the Clean Air Act by 1977 amendments,[23] and accordingly sheds no light upon the intentions of the 87th Congress that adopted both Section 114(a)(2) and Section 114(c) in 1970. Given the actual chronology, the district court's reliance upon Section 114(c) in interpreting Section 114(a)(2) was plainly warranted, while the court of appeals' reliance on Section 114(d) was not. The weight to be attached to Section 114(c) is enhanced, moreover, by the fact that both that subsection and Section 114(a)(2) employ precisely the same language—"authorized representative"—while Section 114(d) speaks only of the Administrator's "representative."

Second and more fundamental, while we may well agree that it is preferable as a matter of policy for EPA to limit intergovernmental communications to regular government employees or officers—as it does, the court of appeals' reading of Section 114(d) is unsupported by any statutory lan-

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Section 114(c) that *includes* persons other than agency employees does not suggest that inspections under Section 114(a)(2) may only be carried out by non-employees or the Administrator acting in person.

In any event, Section 301 of the Clean Air Act authorizes the Administrator to delegate any of his duties, except for rulemaking, to agency employees. In light of the availability of Section 301, the court of appeals' decision limiting the class of "authorized representatives" under Section 114(a)(2) to agency employees renders that language surplusage.

[23] Clean Air Act Amendments of 1977, Pub. L. No. 95-95, Section 113, 91 Stat. 709.

guage or legislative history.[24] Absent any actual indication of congressional intent, it is more reasonable to assume that Congress was content to rely upon EPA's prudence upon this point. "Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied." *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979). In any event, the Court is not asked to decide whether EPA may use contractors to give notices under Section 114(d). However that may be, there is no warrant for interpreting Section 114(a)(2) in light of an intent respecting a different provision of law, enacted at a later date, that has been imputed to Congress without any support in the legislative record.

This is especially so because whatever policies might underlie a restrictive implementation of Section 114(d) have no application in the setting of Section 114(a)(2). The notice function contemplated by Section 114(d) appears to be purely ministerial in nature; no technical expertise is needed. And the decision to undertake a particular inspection is inherently governmental in nature. By contrast, the role fulfilled by EPA contractor-representatives that assist agency employees in stationary source inspections is purely technical. There is no reason for Congress to have assumed that the necessary expertise would, in every instance be available among agency personnel in the necessary location (see page 4, *infra*). Thus participation by specially chosen contractor personnel is wholly appropriate.

Respondent argues (Memo. in Opp. 13), however, that "absent specific direction by Congress," the inspections of the kind involved here should be carried out by government officials because they amount to searches. Although

[24] The legislative history reflects that Congress simply did not focus on this issue. See H.R. Conf. Rep. No. 95-564, 95th Cong., 1st Sess. 135-136 (1977). The Conference Report does make clear that Congress sanctioned informal procedures in this connection, stating that "oral notice would be permitted." *Id.* at 136. The Conference Report also underscores (at 136) that Section 114(d) was "intended to be a protection for States, not for [pollution] sources."

the cases cited by respondent do not in fact support the stated proposition,[25] we may assume that it is generally correct. But see 18 U.S.C. 3105 (allowing persons other than officers authorized by law to *assist* such an officer in serving a search warrant). But, the authority claimed by the Administrator is merely to avail himself of technical assistance in carrying out stationary source inspections. The policies that apply to conventional governmental searches accordingly have no application here. In any event, as we have explained, Congress' intent regarding the issue in this case is clear. Of particular importance in this respect is the provision in Section 114(c) of the Act authorizing the Administrator to disclose information gathered in Section 114(a)(2) inspections to contractor-representatives for use in connection with the purposes of the Act, notwithstanding the fact that the data may include trade secrets or other proprietary information. The significance of this fact is twofold. First, Congress plainly did not regard this area as one governed by policies that require performance of all roles by government employees. Second, given that the Agency unquestionably is authorized to use its own personnel to collect data during inspections, and is free then to turn these data over to contractors whose assistance is needed for analysis, it would be pointless to preclude contractor participation in data collection itself.[26]

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[25] Indeed, *Steele* v. *United States No. 2*, 267 U.S. 505 (1925), *rejects* artificial or overly technical limits upon the scope of a statutory grant of search authority, as does *United States* v. *Gannon*, 201 F. Supp. 68 (D. Mass. 1961).

[26] In any event, contrary to respondent's assumption, this case does not present the question whether EPA contractor-representatives may be authorized to "execute[e] search warrants" (Memo in Opp. 13). The warrant at issue *in this case* runs in favor of:

> EPA, through its duly authorized full-time employees and *accompanying*, authorized representatives under contract with EPA.

Pet. App. 45a (emphasis added). See also *Stauffer I*, *supra*, 647 F.2d at 1076-1077 (same limitation). We emphasize that Section 114(a)(2) requires the Administrator's representative to present proper credentials in order to gain entry to a source's premises.

c. The court of appeals' reliance upon its reading of Section 114(d) led it to adopt a Byzantine interpretation of Section 114 as a whole (Pet. App. 22a):

> [T]he only logical conclusion is that the word "representative" as used in section 114 of the Clean Air Act means EPA officers or employees, unless the latter are already enumerated, as they are in section 114(c). In that event, the plain meaning of "representative," i.e., one standing or acting for another through delegated authority, controls. We realize that this leads to the undesirable result that the word "representative" has different meanings in different portions of the statute * * *.

The court of appeals' view that this result is simply unavoidable is entirely unfounded.

3.a. The only explanation offered by the court of appeals for declining to follow the plain language of Section 114(a)(2) was that "plain meaning * * * is not always decisive * * * especially * * * when the legislative history suggests a different interpretation" (Pet. App. 17a). But the court failed to identify anything in the pertinent legislative history that significantly supports its reading of the statute. Indeed, what little light is shed by the legislative history, supports the agency's position.

The Clean Air Act, as amended in 1967, granted very little federal enforcement authority. No right of entry to stationary sources was provided. The Secretary of HEW was authorized only to require submission of emission reports on such sources. Section 108(j), 42 U.S.C. (Supp. III 1964 ed.) 1857d(j). By contrast, Section 207(a) of the 1967 Act provided for access by an "officer or employee" of the Secretary to the records of motor vehicle manufacturers, 42 U.S.C. (Supp. III 1964 ed.) 1857f-6(a). Both the House of Representatives and the Senate proposed to add stationary source inspection authority to the Clean Air Act when a federal enforcement role was authorized in the 1970 Amendments to the Act. Section 5(a) of the House Bill, H.R. 17255, 91st Cong. 2d Sess. (1970) would have added Section 112(f) to the Act, granting the right to enter and inspect stationary sources, but only to "officers or employees duly designated by the Secretary [of HEW] upon present-

ing appropriate credentials and a written notice to the owner or person in charge * * *." *A Legislative History of the Clean Air Act Amendments of 1970*, 93d Cong., 2d Sess. 923 (Comm. Print 1974) ("Leg. Hist."). The Senate bill, S. 4358, 91st Cong., 2d Sess. (1970), generally granted more expansive inspection authority than its House counterpart. For example, Section 115 of the Clean Air Act as proposed in the Senate bill significantly broadened the basis upon which inspections could be made, deleted the House requirement of written notification, and deleted the House requirement that inspections be completed with reasonable promptness. More pertinently, proposed new Section 116(a)(3) of the Senate bill provided that "the Secretary or his authorized representative" could inspect both stationary sources and motor vehicle manufacturers' premises. *Leg. Hist.* at 570.

In conference, the Senate's language was adopted for stationary source inspectons, *Leg. Hist.* at 163, 198,[27] while the more limited House version, based on the 1967 Act, survived for motor vehicle manufacturers. The Conference Committee's adoption of the more expansive Senate version of Section 114(a)(2) of the Act thus evidenced Congress' deliberate intent to make a distinction, *i.e.*, to grant broader rights of entry to the Administrator than the House version would have allowed. Otherwise, no change of words would have been warranted. See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-200 (1974).

b. The court of appeals, however, discounted this legislative history, in large measure because the legislative reports do not focus upon the difference between the language employed in the House and Senate bills (Pet. App. 19a, 20a). But Congress has no obligation to recognize in legislative history the effect of what it has established through direct statutory language. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980); cf. *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 16 n.18. In any event, Congress' failure to create controlling legislative

[27] "The provisions of the conference substitute with regard to inspections, monitoring and entry follow substantially the provisions of the Senate amendment." *Leg. Hist.* at 198.

history cannot dislodge the effect of the statutory language itself.

The court of appeals also relied (Pet. App. 20a) upon the thumb-nail descriptions of the respective House and Senate bills contained in the Conference Report that referred respectively to entry by "DHEW personnel" and "DHEW investigative personnel." See pages 8-9, *supra*. But, as the Ninth Circuit emphasized in *Bunker Hill*, *supra*, 658 F.2d at 1283-1284, the Conference Report simply does not focus on the identity of persons authorized to make inspections, and the casual descriptions of the two bills employed in the Report simply reflect no view on the question at issue.[28]

c. In any event, Congress' intent affirmatively to distinguish between "authorized representatives" and "officers and employees" emerges clearly from cognate provisions of the statutory language. When Congress intended the right of entry to be limited to EPA's officers and employees, it knew how to say so. Thus, in Sections 206(c) and 208, the mobile sources provisions of the Act, 42 U.S.C. (Supp. V) 7525(c) and 7542, Congress retained the use of the more restrictive term "officers and employees" for inspection of motor vehicle manufacturer's facilities and records, exempting such facilities from the operation of Section 114. Congress could easily have repeated in Section 114 the language of the section dealing with inspections of motor vehicle manufacturers, but chose not to do so. The broader term "authorized representatives" was thus deliberately chosen by Congress.

The court of appeals recognized the difference in statutory language between the stationary source provisions of the Clean Air Act and the motor vehicle manufacturing plant provisions (Pet. App. 23a). Nevertheless, without adducing any support in the legislative history, that court interpreted Section 114(a)(2) to conform to Sections 206(c) and 208 of the Act, reasoning that the maintenance of different rules would be "illogical and inconsistent" (Pet. App. 25a).

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[28] The term "DHEW personnel" is not, in any event, a term with a defined legal significance; it may without difficulty be read to embrace persons retained on contract as well as government employees.

But there is no suggestion of a denial of equal protection of the laws here and any such contention would be frivolous. Accordingly the court of appeals' analysis forgets that "[u]nder our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent policy." *United States* v. *Rutherford*, *supra*, 442 U.S. at 555.[29]

d. As noted above (page 10 & note 7), the court of appeals relied heavily (Pet. App. 26a-29a) upon legislative history of an entirely different statute, the Clean Water Act. Despite the near identity of Section 308(a)(B) of the Clean Water Act, 33 U.S.C. 1318(a)(B), and Section 114(a)(2), that reliance was misplaced. First, it is fundamental that the legislative history of a subsequently enacted statute offers little, if any, help in interpreting an earlier enactment. *Consumer Product Safety Commision* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). To be sure, in relying upon the Senate Report on the Clean Water Act Amendments of 1972, the Sixth Circuit emphasized that both the Clean Air and Water Acts were reported out of the same Senate committee (Public Works) (Pet. App. 28a). Yet, in 1980, that same committee, when considering the "Superfund" legislation, S. 1480, 96th Cong., 1st Sess. (1979), the proposed Environmental Emergency Response Act,[30] wrote:

> To implement the site and facility investigation and response authorities contemplated by this bill, the Ad-

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[29] In any event, there is nothing irrational about the distinction created. Congress could well have taken notice that the number of domestic automobile manufacturers is limited. Congress could also have reasoned that given the importance of this industry, and the special attention it receives in the Clean Air Act generally, it was reasonable to expect EPA to develop the technical expertise necessary to carry out inspections with its own employees. The same could hardly be said of the nearly infinite variety of expertise that might be needed in inspection of all other forms of industrial plants. See page 45, *infra*.

[30] The Superfund bill, which created a cleanup and compensation mechanism to address hazardous waste deposits, eventually was enacted into law, with changes that are not pertinent here, on December 11, 1980. Comprehensive Environmental Response Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. (Supp. V) 9601 *et seq.*

> ministrator will frequently utilize contractors as his authorized representatives. *The access, entry and other information-gathering powers granted to the Administrator and his authorized representative under * * * section 114 of the Clean Air Act [and] section 308 of the Clean Water Act * * * apply to authorized Federal contractors as the Administrator's representatives.*

S. Rep. No. 96-848, 96th Cong., 2d Sess. 62 (1980) (emphasis added). The conflict between these two pieces of legislative history emphasizes the hazards of reliance upon after-the-fact legislative history. In both instances the reliability of the statements made respecting earlier legislation is open to question, both because there was relatively little incentive for any Member of Congress to state a different view, and because no Member is likely to have altered his vote because of agreement or disagreement with the Report's description of prior legislation.[31]

In addition to the legislative history of the Clean Water Act, the court of appeals relied (Pet. App. 29a) upon language and legislative history of Section 3007(a) of the Solid Waste Disposal Act, 42 U.S.C. 6927(a). As indicated above (page 10), a 1980 amendment added "representative[s]" of the Administrator to the enumeration of persons designated to make hazardous waste inspections. The Senate Report stated:

> [T]he amendment *clarifies* that the Administrator may authorize EPA contractors to obtain samples, perform inspections, and examine records at facilities which handle hazardous wastes.

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[31] In any event, the 1972 legislative history of the Clean Water Act is at best ambiguous. The language upon which the court of appeals relied (see page 10 note 7, *supra*), could be read to address only the status of contractors engaged in "research and development" as distinguished from those assisting in inspections to determine compliance with emissions limitations.

S. Rep. No. 96-172, 96th Cong., 2d Sess. 3 (1979) (emphasis added). Notwithstanding the fact that Congress chose the term "representative"—the very language at issue here—to achieve the effect noted in the report, the inference drawn by the court of appeals was: "[w]hen Congress meant to *expand* inspection authority *beyond* EPA officers and employees it knew how to do so and took specific steps to make that clear" (Pet. App. 30a; emphasis in original). But Congress has no obligation to create legislative history documenting that it meant what it said. See page 40, *supra*.

4. Our discussion thus far suffices, we presume to suggest, at least to demonstrate that the court of appeals' analysis is flawed, and that substantial arguments can be marshalled in favor of the agency's interpretation of the statute. Indeed, the court of appeals all but conceded the point (Pet. App. 16a-17a, 22a, 29a, 30a, 41a). The court acknowledged that "cogent arguments can be raised upon both sides" of the issue (*id.* at 33a), and recognized that inferences opposed to its own could "just as logically" be drawn from the legislative materials (*id.* at 30a; see also *id.* at 24a). In the circumstances, the court of appeals plainly was obliged to defer to the agency's interpretation of the statute it is charged with enforcing. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). To merit such deference the agency's interpretation of its statute need not be the only reasonable one, nor need it be the one the court would prefer were it writing on a clean slate. *Ibid.* And these principles apply with full force to our Nation's complex environmental laws. See, *e.g.*, *EPA* v. *National Crushed Stone Ass'n*, 449 U.S. 64, 93-84 (1980). Specifically, this Court has "accorded great deference to the Administrator's construction of the Clean Air Act." *Union Electric Co.* v. *EPA*, 427 U.S. 246, 256 (1976). In the circumstances, there is no room to doubt that the agency's interpretation of Section 114(a)(2) "was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency" (*Train* v. *NRDC*, 421 U.S. 60, 87 (1975)).[32]

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[32] Since its creation in 1970, the EPA has construed the phrase "authorized representative" as used in both Sections 114(a)(2) and 114(c) to include contractor-representatives. As the district court found, the

The court of appeals' decision eliminates an important tool employed by the EPA to assure enforcement of the Clean Air Act through its overview inspection program. If private contractors may not be designated to assist in conducting Section 114(a)(2) inspections, the agency's ability to operate an effective overview inspection program may be compromised. For instance, only 22 technically trained employees employed in EPA's Region IV (the administrative unit encompassing Tennessee) are responsible for monitoring compliance by approximately 4600 major stationary sources of air pollution located in an eight-state area. See Pet. App. 59a. EPA has relied upon contractor-representatives both because its own enforcement resources are limited and because private contractors often possess considerable expertise and experience with certain industrial processes of inspection interest (*id.* at 60a). If EPA may not use the services of contractor-representatives, it will be obliged to hire employees who possess the requisite technical expertise. Because such expertise may be industry-specific, the hiring of numerous experts, each possessing a narrow technical specialty may be required, even though the services of such experts are not necessarily required on a full-time basis. Accordingly, the decision of the court of

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clearest indication of EPA's construction of the term "authorized representative" is found in the agency's conduct. In addition, since its creation in late 1970, EPA has sought and received appropriations for the use of contractors to provide technical support for its enforcement responsibilities: See *Second Supplemental Appropriations for Fiscal Year 1971: Hearings on H.R. 8191 Before the Senate Comm. on Appropriations*, 91st Cong., 1st Sess. 1626 (1971). See also *Agriculture—Environmental and Consumer Protection Appropriations for 1973: Hearings Before a House Subcomm. on Appropriations of the Comm. on Appropriations*, 92d Cong., 2d Sess., Pt. 5, at 471-506 (1972). EPA's interpretation of the term "authorized representative" employed in Section 114 of the Clean Air Act is also reflected in the published administrative history of EPA's procedures for handling confidential business information. See 40 Fed. Reg. 21990 (1975); 43 Fed. Reg. 40007 (1978). We note, as well, that in considering amendments to the Clean Air Act, and to Section 114 in particular in 1977, Congress made no effort to alter EPA's use of contractors as authorized representatives.

appeals is likely to restrict EPA's ability to fulfill its statutory duties in the most efficient manner.

B. Sufficient Safeguards Exist to Protect Against Improper Disclosure of Trade Secrets

The Sixth Circuit's opinion reflects an unfounded apprehension that permitting the Administrator to secure technical support from contractor personnel during overview inspections could compromise trade secrets of a source subject to inspection (see Pet. App. 33a).[33] We note at the threshold that the court of appeals' concerns are its own and not Congress'. As explained above (page 38), Section 114(c) of the Clean Air Act generally prohibits public disclosure of trade secrets obtained in the course of a Section 114(a)(2) inspection, but permits disclosure to agency contractor-representatives providing technical assistance to the agency in carrying out the provisions of the Act. Plainly, concern about disclosure of proprietary information by contractor-representatives did not inform Congress' crafting of Section 114.

In any event, EPA fully shares the court of appeals' solicitude for the protection of confidential business information. The agency has established adequate safeguards against improper disclosure of trade secrets by contractor-representatives. Pursuant to regulations of general applicability, 41 C.F.R. 15-7.350-1 and -2, EPA's contract with PEDCo requires that trade secrets and similar information be kept confidential. A confidentiality agreement between PEDCo and its employees expressly forbids disclosure of confidential information. Under that agreement, employees are subject to dismissal as well as to liability for any damages incurred by PEDCo in consequence of any

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[33] The court of appeals' statement (Pet. App. 42a-43a), in denying EPA's petition for rehearing en banc, that EPA had not demonstrated that it "requires the services of a private contractor who is a competitor of Stauffer with conflicting interests who may have an axe to grind and may be interested in obtaining trade secrets of Stauffer" is totally without record support. The district court remarked correctly that "[i]t does not appear in this case * * * that PEDCo Environmental, Inc. was in direct competition with Stauffer" (Pet. App. 54a).

willful breach of confidentiality.[34] Under EPA regulations, the private contractor agrees that an "affected business having an interest in information concerning it"—*i.e.*, a source subject to inspection—is entitled to third-party beneficiary status under any such confidentiality agreement and may enforce the agreement against any breaching employee. 40 C.F.R. 2.301(h)(2)(ii)(C). In addition, a powerful incentive for scrupulous observance of confidentiality requirements is provided by agency regulations that provide that breach of confidentiality is grounds for debarment of the contractor or the employee responsible. 40 C.F.R. 2.211(d). As the district court found, the combined effect of these safeguards is "sufficient protection against disclosure" (Pet. App. 53a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1983

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[34] The pertinent portions of the confidentiality agreement between PEDCo employees and PEDCo are reproduced at Pet. App. 53a n.5.

APPENDIX

Section 114 of the Clean Air Act, 42 U.S. C. (Supp. V) 7414, provides in pertinent part:

Recordkeeping, inspections, monitoring, and entry

(a) Authority of Administrator or authorized representative

For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)—

(1) the Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install, use, and maintain such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and

(2) the Administrator or his authorized representative, upon presentation of his credentials—

(A) shall have a right of entry to, upon, or through any premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

* * * * *

(c) Availability of records, reports, and information to public; disclosure of trade secrets

Any records, reports or information obtained under subsection (a) of this section shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than emission data), to which the Administrator has access under this section if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter or when relevant in any proceeding under this chapter.

(d) Notice of proposed entry, inspection, or monitoring

(1) In the case of any emission standard or limitation or other requirement which is adopted by a State, as part of an applicable implementation plan or as part of an order under section 7413(d) of this title, before carrying out an entry, inspection, or monitoring under paragraph (2) of subsection (a) of this section with respect to such standard, limitation, or other requirement, the Administrator (or his representatives) shall provide the State air pollution control agency with reasonable prior notice of such action, indicating the purpose of such action. No State agency which receives notice under this paragraph of an action proposed to be taken may use the information contained in the notice to inform the person whose property is proposed to be affected of the proposed action. If the Administrator has reasonable basis for believing that a State agency is so using or will so use such information, notice to the agency under the paragraph is not required until such time as the Administrator determines the agency will no longer so use information contained

in a notice under this paragraph. Nothing in this section shall be construed to require notification to any State agency of any action taken by the Administrator with respect to any standard, limitation, or other requirement which is not part of an applicable implementation plan or which was promulgated by the Administrator under section 7410(c) of this title.

(2) Nothing in paragraph (1) shall be construed to provide that any failure of the Administrator to comply with the requirements of such paragraph shall be a defense in any enforcement action brought by the Administrator or shall make inadmissible as evidence in any such action any information or material obtained notwithstanding such failure to comply with such requirements.

Office - Supreme Court, U.S.
FILED
AUG 12 1983

No. 82-1448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

STAUFFER CHEMICAL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED *

1. Whether EPA is collaterally estopped from relitigating in this case from the Sixth Circuit the identical question of statutory interpretation which the Tenth Circuit had already resolved against EPA in earlier litigation involving the same parties and virtually identical facts.

2. Whether EPA has power under Section 114(a)(2) of the Clean Air Act to designate a private contractor as its "authorized representative" for purposes of obtaining and executing administrative search warrants.

* These questions have been restated from those set out in petitioner's brief.

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IN THE

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OCTOBER TERM, 1983

No. 82-1448

UNITED STATES OF AMERICA,
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STAUFFER CHEMICAL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT[1]

INTRODUCTION

This case concerns the Environmental Protection Agency's ("EPA's") attempted use of private contractors to carry out inspections of plants under Section 114(a)(2) of the Clean Air Act ("the Act"), 42 U.S.C. § 7414(a)(2).[2] The facts and circumstances of this case are virtually identical to those of a contemporaneous, parallel case in-

[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, respondent's non-wholly owned subsidiaries and affiliates were set out in a list at Appendix A to Respondent's Memorandum In Opposition to the petition.

[2] EPA suggests that the contractors were only to provide "technical assistance" to EPA employees in conducting the inspection. See Brief for United States ("EPA's Brief") at 2. However, the warrants authorized the contractors themselves to enter and conduct the inspection (see Warrant, Joint Appendix in Court of Appeals ("Jt. App. Ct. Appls.") 49), and EPA's overview inspection program contemplates that contractors will inspect plants both with and without the presence of an EPA employee. See *infra* at 3. Most importantly, EPA's preferred interpretation of the relevant statutory provisions would allow contractors both to obtain and to execute warrants independently of EPA officials. See *infra* at 22-23.

volving the same parties. The precise issue of statutory interpretation arising here was resolved against EPA in this prior case.

In March and April of 1980, EPA sought to use contractors as its "authorized representatives" to enter two plants owned and operated by Stauffer Chemical Co. ("Stauffer"). Each of the inspections by contractors was to take place as part of the Agency's "overview inspection program," instituted for the purpose of auditing state enforcement and inspection procedures. See EPA's Brief at 2 n.1. In each instance, EPA officials and the contractors first arrived without a warrant and sought to enter and inspect the plants. Company officials then noted that they had no objection to an inspection by EPA or state officials, but that they wanted an agreement to protect trade secrets before private parties examined plant premises. Although in both cases subsequent discussions took place regarding such an agreement, EPA sought and obtained from federal magistrates on an *ex parte* basis administrative search warrants specifically authorizing the contractors to enter the plants and inspect the premises. Stauffer refused to honor the warrants insofar as the contractors were concerned and sought from the pertinent federal district courts orders quashing the warrants and enjoining the inspections. In both cases, by order or agreement, the warrants were stayed pending a judicial ruling on the merits.

In the first decision (*"Stauffer I"*),[3] the U.S. District Court for the District of Wyoming quashed the warrant and enjoined further inspections using contractors, ruling that EPA had no authority under the Act to designate contractors as its "representatives" for purposes of entry and inspection. The Tenth Circuit affirmed.

In the second and instant case (*"Stauffer II"*), the U.S. District Court for the Middle District of Tennessee

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[3] *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), *aff'd sub nom. Stauffer Chemical Co.* v. *EPA*, 647 F.2d 1075 (10th Cir. 1981).

upheld EPA's asserted authority to designate private contractors as inspectors under the Clean Air Act. (511 F. Supp. 744, Pet. App. 44a-56a.) The Sixth Circuit, however, reversed, holding (1) that EPA was collaterally estopped by the decision in *Stauffer I* from designating private contractors to conduct the inspection, and (2) that the Act substantively does not authorize the Agency to designate contractors to carry out that task. (684 F.2d 1174, Pet. App. 1a-41a.)

Because of the direct relevance of the decision in *Stauffer I* to this case (*Stauffer II*), the statement of the case which follows will address both actions, beginning with the district court proceeding in *Stauffer I*.

STATEMENT OF THE CASE

EPA's inspections of Stauffer's plants using the Agency's own designated employees have always proceeded without incident and with Stauffer's full cooperation. On the few occasions prior to 1980 when EPA requested that its private contractors visit a plant, Stauffer and EPA negotiated an agreement signed by the contractor and Stauffer to protect trade secrets. The visits by contractors then took place in due course. (Jt. App. Ct. Appls. 100, 103, 108, 111-112.)

A. District Court Proceedings in *Stauffer I*

Region VIII of EPA is headquartered in Denver and has responsibility for a six-state area encompassing Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming. Beginning with calendar year 1980, EPA's Region VIII began using private contractors in carrying out its overview inspection program. *Stauffer I*, 14 Env't Rep. Cas. (BNA) at 1739 (¶¶ 14-15). Inspections were to be handled primarily by the private contractors, both with and without the presence and supervision of a full-time EPA employee. *Id.* (¶ 15).

The contractor employed by EPA in *Stauffer I* was GCA Corporation ("GCA"). The GCA engineers were to inspect Stauffer's phosphate ore processing plant located at Leefe (near Sage), Wyoming. *Id.* (¶ 11).

The inspection at the Leefe plant was first attempted on April 10, 1980. An EPA employee, a Wyoming employee, and the two GCA employees arrived unannounced at the plant. *Id.* at 1738 (¶ 5). Stauffer's employees told the group that they had no objections to an inspection by EPA and Wyoming officials, but that a written agreement to protect trade secrets would have to be executed by GCA and Stauffer before the contractor's employees would be allowed entry. *Id.* (¶¶ 6-8). The EPA and Wyoming employees chose not to make the inspection. Thereafter, discussions regarding a trade-secrets agreement proceeded between EPA and Stauffer based on the text of an agreement which had been used earlier when an EPA contractor had visited a different Stauffer plant. *Id.* (¶ 9).[4]

While the discussions were still underway, on May 8, 1980, EPA sought an administrative search warrant from the U.S. Magistrate in Cheyenne, Wyoming. The warrant was issued on an *ex parte* basis that same day. *Id.* at 1738-39 (¶ 10). It authorized entry by "any duly designated enforcement officers of the Environmental Protection Agency, and authorized employees of EPA's contractor, GCA Corporation," and empowered these persons to inspect "facilities, processes, records, files and papers associated with the processing of phosphate ore." *Id.*

On May 13, 1980, a group consisting of an EPA employee, an EPA lawyer, a Wyoming employee, and the two GCA employees appeared unannounced at the plant and sought to execute the warrant. *Id.* at 1739 (¶ 11).

Stauffer's plant manager told the EPA and Wyoming officials that they were welcome to conduct the inspection

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[4] Stauffer *never* sought to restrict in any way an inspection by EPA's own employees. 14 Env't Rep. Cas. (BNA) at 1738-40 (¶¶ 6, 9, 11, 17-18). The contrary statement in EPA's brief is in error. EPA's Brief at 3.

Correlatively, Stauffer did not propose to limit the contractor's access to parts of the plant that emitted pollutants. It did want to control the contractor's access to other areas of the plant. 14 Env't Rep. Cas. (BNA) at 1739 (¶ 9).

but refused entry to the GCA employees absent an agreement to protect trade secrets. *Id.* The EPA officials decided not to conduct the inspection themselves, and the EPA and GCA group departed. Stauffer immediately moved in federal district court to quash the warrant and also sought a temporary restraining order enjoining execution of the warrant. The court granted such an order on the same day, May 13, 1980. *Id.* (¶ 12).

Thereafter, a two-day evidentiary hearing was held in the district court, and on June 23, 1980, the court entered judgment quashing the warrant and enjoining EPA from causing its private contractors to enter Stauffer's plants in Wyoming to conduct inspections. The court's ruling was premised on alternative grounds: *first*, that EPA had no authority under Section 114(a)(2) of the Clean Air Act, 42 U.S.C. § 7414(a)(2), to designate private contractors as its "authorized representatives" for purposes of entry and inspection; and *second*, that in the particular circumstances EPA's use of an *ex parte* procedure to obtain the administrative search warrant from the federal magistrate violated principles of fundamental fairness. 14 Env't Rep. Cas. (BNA) at 1740-41.[5] On August 19, 1980, EPA filed notice of its appeal to the Tenth Circuit.

B. District Court Proceedings in *Stauffer II*

The contractor employed by EPA in *Stauffer II* was PEDCo Environmental, Inc. ("PEDCo"). Two PEDCo employees were to inspect Stauffer's elemental phosphorous plant located at Mt. Pleasant, Tennessee. (Jt. App. Ct. Appls. 38.) An EPA official, a Tennessee official, and

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[5] In connection with the second ground of its decision, the district court observed that

> EPA had Dr. O'Boyle and Mr. Gribb, both of whom were competent to have performed the inspection and both of whom were not denied entry, present, ready, and able to make the two or three hour inspection, but instead of letting them do it while the contract inspectors waited outside the plant, *EPA's counsel apparently wanted to make this a test case.*
>
> *Id.* at 1741 (¶ 3) (emphasis added).

these two PEDCo employees appeared unannounced at the plant on March 27, 1980. Stauffer's plant manager welcomed the inspection by EPA and Tennessee officials [6] but refused to allow the PEDCo employees to enter in the absence of a written agreement with PEDCo to protect trade secrets. (Jt. App. Ct. Appls. 59.) The EPA group left without making the inspection, and again discussions followed regarding a secrecy agreement. (*Id.*)

On August 7, 1980, approximately six weeks after the Wyoming federal district court in *Stauffer I* had ruled that EPA had no authority to employ private contractors to make inspections, EPA sought from a federal magistrate in Nashville, Tennessee, an administrative search warrant for PEDCo's employees to enter and inspect Stauffer's Mt. Pleasant plant. (Jt. App. Ct. Appls. 5-48.)[7]

The warrant was issued on an *ex parte* basis the same day. It authorized entry at and inspection of the Mt. Pleasant plant by "duly authorized full-time employees [of EPA], and accompanying, authorized representatives under contract to EPA." (Jt. App. Ct. Appls. 49.) On that same day, an EPA official, an EPA attorney, and the two PEDCo employees arrived at the plant to make the inspection. A Tennessee official accompanied them. Again, Stauffer's plant staff welcomed inspection by the EPA and Tennessee officials but refused to allow entry by PEDCo's employees absent a written agreement with PEDCo to protect trade secrets. (Jt. App. Ct. Appls. 64, 120.) No inspection was made. On the following day,

[6] Five months earlier, on October 17, 1979, EPA officials had conducted an oversight inspection at the plant. A Tennessee official was also present. (Jt. App. Ct. Appls. 37.)

[7] The prior ruling adverse to EPA in *Stauffer I* was disclosed in a footnote in a Memorandum of Law accompanying EPA's application for the warrant. (Jt. App. Ct. Appls. 47.) In support of its position, EPA cited dicta in a decision by a federal magistrate in North Carolina. In the cited case, the magistrate had held that Alcoa had waived its right to contest a similar warrant and that the dispute was moot because the warrant had been executed. See *Aluminum Co. of America* v. *EPA*, 663 F.2d 499, 500 (4th Cir. 1981). Compare EPA's Brief at 4 n.2.

EPA filed in federal district court a petition for an order to show cause why Stauffer should not be held in contempt. Stauffer simultaneously filed a motion to quash the warrant and an application for a temporary restraining order barring execution of the warrant. Stauffer's application for a temporary restraining order was mooted by EPA's agreement not to seek to execute the warrant pending the court's decision on the cross-motions.

On April 17, 1981, the Tennessee federal district court denied Stauffer's motion to quash and also denied EPA's contempt petition on the ground that "Stauffer legitimately believed that private contractors were not authorized representatives under the Clean Air Act" to perform inspections. (511 F. Supp. 750; Pet. App. 56a.) Stauffer promptly appealed, and after the district court refused to stay its decision and execution of the warrant pending appeal, Stauffer obtained a stay to that effect from the Sixth Circuit.

C. The Tenth Circuit Decision in *Stauffer I*

On May 8, 1981, three weeks after the Tennessee federal district court's decision in *Stauffer II*, the Tenth Circuit affirmed the Wyoming federal district court's decision in *Stauffer I* quashing the warrant there at issue and enjoining EPA from using contractors to make inspections at Stauffer's plants in Wyoming. *Stauffer Chemical Co. v. EPA*, 647 F.2d 1075 (10th Cir. 1981). The Tenth Circuit's decision rested squarely and solely on the ground that private contractors were not "authorized representatives" of EPA for purposes of Section 114(a)(2). *Id.* at 1079. EPA unsuccessfully sought rehearing.

D. The Sixth Circuit Decision in *Stauffer II*

Because of the Tenth Circuit's explicit ruling in *Stauffer I* that EPA had no right to designate private contractors to enter and inspect plants, the appeal to the Sixth Circuit from the Tennessee federal district court's decision focused both on whether EPA was collaterally

estopped from claiming such a right and on whether such a right existed.[8]

On July 7, 1982, the Sixth Circuit reversed the Tennessee federal district court, adopting two alternative grounds for its decision that the warrant should have been quashed. Each of the three judges wrote separately. Judge Weick, joined by Judge Jones, concluded that EPA was collaterally estopped from obtaining a warrant authorizing a private contractor to make the inspection, because of the prior decision in *Stauffer I* as affirmed by the Tenth Circuit. (684 F.2d 1179-81, 1190-92; Pet. App. 8a-13a, 34a-38a.) District Judge Siler, sitting by designation, did not agree that the doctrine of collateral estoppel applied. (684 F.2d 1192-93; Pet. App. 39a-41a.) Judge Siler joined Judge Weick, however, in concluding that Section 114(a)(2) of the Act does not permit EPA to designate contractors as its representatives for purposes of entry and inspection. (684 F.2d 1192; Pet. App. 39a.) Judge Jones did not reach this issue. (684 F.2d 1190; Pet. App. 34a.) Each judge thus joined in the result, and Judge Weick's opinion spoke for a majority of the court on each of the two alternative holdings.[9]

1. ***Collateral estoppel.***

Judge Weick observed that "[t]he facts in *Stauffer I* were identical to those in the instant case except they

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[8] The Wyoming federal district court in *Stauffer I* based its holding on alternative grounds, and for purposes of collateral estoppel its judgment initially was not necessarily conclusive as to either of the grounds standing alone. See *Hicks* v. *Quaker Oats Co.*, 662 F.2d 1158, 1168-73 (5th Cir. 1981); *Restatement (Second) of Judgments* § 27, comment i (1982). However, when the Tenth Circuit upheld the Wyoming federal district court's interpretation of the Clean Air Act, the judgment definitely became conclusive as to that ground. See *Hicks* v. *Quaker Oats Co.*, *supra*; *Restatement*, *supra*, comment o.

[9] In view of its disposition of the case on the two cited grounds, the court did not reach Stauffer's further claim that EPA could not obtain administrative search warrants on the basis of *ex parte* proceedings absent a showing of good cause for such proceedings. See EPA's Brief at 4 n.3.

arose in a plant of Stauffer's at a different location." (684 F.2d 1179, Pet. App. 9a.) In the circumstances, based on the principles of collateral estoppel set out in *Montana* v. *United States*, 440 U.S. 147 (1979), Judge Weick concluded that "there is no valid reason why they [*i.e.*, the questions decided in *Stauffer I*] should be relitigated a second time in the present case." (684 F.2d 1180, Pet. App. 12a.) He specifically considered whether the case fell within the exception for " 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana*, 440 U.S. at 162, *quoting United States* v. *Moser*, 266 U.S. 236, 242 (1924). Judge Weick noted that in applying the exception this Court in *Montana* had focused on the relative similarity of the actions in terms of subject matter, context and time. (684 F.2d 1181, Pet. App. 12a-13a.) Because the claims involved were so closely related as to be virtually identical, he accordingly did not apply the *Moser* exception. *Id.*

Judge Jones concurred, agreeing that "it is undisputed that the issue resolved by the litigation in *Stauffer I* is identical to the question raised in this appeal." (684 F.2d 1190, Pet. App. 34a.) He also focused on answering the following two questions posed in *Montana*, 440 U.S. at 155:

> (1) "whether controlling facts or legal principles have changed significantly" since the judgment in the prior suit; and (2) "whether other special circumstances warrant an exception to the normal rules of preclusion."
>
> (684 F.2d 1190, Pet. App. 35a.)

Judge Jones found neither factor to be present. He considered specifically whether any injustice would result from precluding EPA from using contractors to enter Stauffer's plants, while not estopping EPA as to competitors' plants. He concluded that a greater injustice would arise as a result of according different treatment to Stauffer plants in different locations. (684 F.2d 1191,

Pet. App. 36a.)[10] He also observed that the other two members of the panel had reached the merits and had resolved the statutory question against EPA, so all plants in the Sixth Circuit stood on the same footing in any event. (684 F.2d 1191, Pet. App. 37a.) In addition, while Judge Jones approved generally of the practice of agency relitigation of legal issues, he concluded that in cases *of defensive use* of estoppel *where mutuality was present*, *i.e.*, where the parties to the cases were the same, this factor should not be controlling. (684 F.2d 1191-92, Pet. App. 38a.) As he said:

> While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication.
> (684 F.2d 1192; Pet. App. 38a.)

Judge Siler would not have applied collateral estoppel. He would have given controlling weight to permitting agencies to relitigate legal issues,[11] and he also considered that an injustice may arise if EPA were precluded from using contractors to inspect Stauffer's plants but

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[10] Judge Jones explained (*id.*):

> In my opinion, the injustice, if any, is suffered by Stauffer whose plants and trade secrets in one area will be protected, while in another, private individuals will be able to enter and inspect its facilities. To prevent such an anomaly, collateral estoppel should be applied.

Judge Jones explicitly drew an analogy between this case and *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), a case involving alleged violations of OSHA's noise regulations. The manufacturer had prevailed in a prior proceeding involving alleged violations of the same regulation at different plants. The Seventh Circuit approved defensive use of collateral estoppel by the manufacturer to block the subsequent proceedings by OSHA. See 684 F.2d 1191 n.2, Pet. App. 36a n.2.

[11] In this connection, Judge Siler relied particularly on *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803, 808 (9th Cir. 1980). But see the discussion *infra* at 26 & n.23.

not those of its competitors. (684 F.2d 1192, Pet. App. 40a-41a.)

2. EPA's "representatives" for purposes of entry under Section 114(a)(2).

Judge Siler nonetheless concurred with Judge Weick that on the merits EPA had no authority to designate contractors as its "representatives" to enter and inspect plants under Section 114(a)(2). He emphasized the lack of express authority for such a radical departure from the common-law principle that only governmental officers could conduct searches:

> Where the federal government has embarked upon a policy so radically divergent from its standard policy, that is, having only government officers or employees executing search warrants and inspecting plants, it seems that authority for such conduct should be clear from the Act itself or from legislative history.
>
> (684 F.2d 1192-93, Pet. App. 41a.)

Judge Weick meticulously parsed the statutory language and the legislative history. He noted that the statute did not define "representative" and rejected EPA's plain-meaning argument. *Id.* He explored the background for the fact that the language "authorized representative" enacted in the 1970 Amendments to the Clean Air Act came from the Senate version in place of a reference to "officers or employees" in the corresponding House bill. He pointed out that the Conference Report described the competing phrases in equivalent terms, referring to "DHEW personnel" and "DHEW investigative personnel," respectively. (684 F.2d 1183-84, Pet. App. 18a-20a.)[12]

Judge Weick also drew assistance from the statutory context. He noted that one other part of Section 114 uses the term "representatives" in connection with EPA's

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[12] The Department of Health, Education and Welfare was then responsible for administering the Clean Air Act. These duties were transferred to EPA upon its creation.

entry and search powers. Section 114(d), added by the 1977 Amendments to the Act, requires "the Administrator (or his representatives)" to give notice to the applicable state pollution control agency before making an inspection under Section 114(a)(2). Given the sensitive nature of the intergovernmental communication involved, he considered that this function "necessarily envisions EPA employees." (684 F.2d 1184, Pet. App. 21a.) He concluded that the term "representative" should be given the same meaning in both Sections 114(a)(2) and (d). *Id.*

Judge Weick distinguished Section 114(c), which refers to "representatives of the United States" rather than of the Administrator. That provision allows EPA to disclose confidential information to "other officers, employees, or authorized representatives of the United States" where necessary to carry out their duties. He considered that a broader category of persons could receive confidential information as "representatives of the United States" for purposes of Section 114(c) than could exercise entry and search authority as a "representative" of the Administrator under Sections 114(a)(2) and (d). (684 F.2d 1185, Pet. App. 22a.) Judge Weick also opined that if the term "representative" in Section 114(a)(2) meant persons other than EPA employees, the "absurd result" would arise that only the Administrator and private contractors could make inspections, but EPA employees could not. *Id.*

As the Tenth Circuit had done in *Stauffer I*, Judge Weick also gave weight to the legislative history of the adoption in 1972 of a provision in the Federal Water Pollution Control Act (now "Clean Water Act") providing for entry and inspection by EPA in terms virtually identical to those of Section 114(a)(2) of the Clean Air Act. The Senate Report of the bill which was the basis of final enactment of the provision states:

> It should also be noted that *the authority to enter, as under the Clean Air Act, is reserved to the Administrator and his authorized representatives which*

> *such representatives must be full time employees of the Environmental Protection Agency.* The authority to enter is not extended to contractors with the EPA in pursuit of research and development.
>
> (684 F.2d 1187, Pet. App. 27a, *quoting* S. Rep. No. 414, 92d Cong., 1st Sess. 63 (1971), *reprinted in* 1972 *U.S. Code Cong. & Ad. News* 3668, 3729 (emphasis added).)

Judge Weick noted that the court in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981), had dismissed this statement, but he considered that this was an exceptional case where post-enactment legislative history was useful. He observed that the statement provided an authoritative construction of the nearly identical provision in the Clean Water Act, and that the provision was explicitly modeled by Congress after Section 114(a)(2) of the Clean Air Act. The provisions in the two Acts were in *pari materia* with one another and should be given a congruent construction. In addition, he pointed out that the statement regarding the provision in the Clean Water Act was made by the same committee and came "a scant ten months" after enactment of the 1970 Amendments to the Clean Air Act. (684 F.2d 1187, Pet. App. 28a.)

Judge Weick also rejected claims by EPA that Congress had ratified use of contractors for searches by failing to amend Section 114(a)(2) and by making appropriations that included funds for use of contractors. (684 F.2d 1189, Pet. App. 31a-33a.)

Finally, like Judge Siler, Judge Weick observed that "the execution of search warrants is a traditionally governmental function." (684 F.2d 1189, Pet. App. 33a.) He pointed out that Congress had amended the entry and inspection provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6927(a), to expand the persons who could make searches, and that the legislative history of that amendment expressly referred to private contractors as being among those who were newly eligible to conduct inspections. (684 F.2d 1188, Pet. App. 29a-30a.) In his view, given the strong tradition of conducting

searches only by governmental officials, the absence of any similar expression of congressional intent regarding the Clean Air Act was instructive.

3. Denial of rehearing.

A petition by EPA for rehearing and rehearing en banc was denied. (684 F.2d 1193, Pet. App. 42a-43a.) In denying rehearing, the court commented that "a private contractor . . . may have an axe to grind and may be interested in obtaining trade secrets of Stauffer." *Id.*

SUMMARY OF ARGUMENT

A. Collateral Estoppel

This case concerns "defensive" use of collateral estoppel by a private party faced with successive, contemporary, virtually identical demands by a governmental agency. In this case from the Sixth Circuit, each judge separately, and properly, concluded that the case arose on facts and circumstances nearly the same as those before the federal district court in Wyoming and the Tenth Circuit in *Stauffer I*. There EPA had fully and fairly litigated the legal question whether it had authority to use a private contractor as its "representative" to enter and search plant premises—and it had lost. Under the principles of collateral estoppel set out in *Montana* v. *United States*, 440 U.S. 147 (1979), EPA cannot relitigate this same question in this parallel case.

There is no basis for EPA's contention that this case falls within the exception for "'unmixed questions of law' in successive actions involving substantially unrelated claims." *Montana*, 440 U.S. at 162, *quoting United States* v. *Moser*, 266 U.S. 236, 242 (1924). As explained in *Montana*, the *Moser* exception turns on whether a legal issue arises in comparable circumstances, considering subject matter, context and time. As the court of appeals determined, this case is strikingly parallel to *Stauffer I* in *all* respects, not just the parties and the issue as EPA claims. The differences relate only to location (the plants were in different states) and the identity of the contractors. Neither detail has any legal significance whatsoever.

Moreover, as the maker of the successive demands, EPA controlled the forums involved and the timing. EPA's brief attributes the remarkable congruence of the cases to "pure coincidence." EPA's Brief at 18. However, in *Stauffer I* the Wyoming federal district court concluded that EPA had chosen to develop a "test case," and in this case Judge Jones believed that EPA wanted to "test its policy decisions" and to do so "the same defendant [wa]s sued *in seriatim*." (684 F.2d 1192, Pet. App. 38a.) Particularly in these circumstances, EPA has no grounds to complain about being collaterally estopped by the judgment in *Stauffer I*.

The crux of EPA's argument is that the principles announced in *Montana* should be limited so as not to apply to "recurring questions of public law." EPA's Brief at 22-31. This proposed exception sweeps so broadly that it would virtually swallow the entire *Montana* doctrine. The government's special role in enforcing federal laws is beyond question, but that role does not exempt an agency such as EPA from *any* application of collateral stoppel *whatsoever*. Instead, a court faced with successive suits on the same question or right should consider the government's role simply as one of the factors used in making the balancing calculus explained in *Montana*.

Where, as here, collateral estoppel is being used *defensively by a party* to the prior litigation, the goverment should be estopped in its successive suit. The government's special role is outweighed by the countervailing considerations of conclusive resolution of disputes, conservation of judicial resources, and protection of a prevailing defendant against expensive and vexatious multiple actions. Since *Montana* was decided, the courts of appeals have uniformly concluded that collateral estoppel may appropriately be invoked defensively by a party faced with successive government suits. Where the government's successive demand is comparable in all significant respects, defensive use of estoppel fosters fairness and equal treatment.

B. EPA's "Representatives" Under Section 114(a)(2)

Section 114(a)(2) of the Clean Air Act does not authorize EPA to designate private contractors as its representatives for purposes of obtaining and executing administrative search warrants. The Section was enacted as part of the Clean Air Act Amendments of 1970. Every indication of legislative intent points toward an interpretation of Section 114(a)(2) that would require EPA to use only its own employees to enter, search and inspect private premises. The Senate and House versions of the provision were described in the conference report as authorizing entry and searches by "DHEW personnel" and "DHEW investigative personnel," respectively. (The Department of Health, Education, and Welfare was EPA's predecessor.) Moreover, the Senate bill from which the language of Section 114(a)(2) was drawn uniformly and consistently used the term "representative" to refer to designated EPA employees.

Shortly after the enactment of the 1970 Amendments to the Clean Air Act, Congress expressly used Section 114(a)(2) as a model in adding an entry and search provision to the Clean Water Act. That provision, Section 308(a)(B) of the Clean Water Act, added by the Federal Water Pollution Control Act Amendments of 1972, is virtually identical to Section 114(a)(2). The legislative history of the provision in the Clean Water Act states explicitly that "authority to enter, as under the Clean Air Act, is reserved to the Administrator and . . . full time employees of [EPA]." The provisions in the two Acts thus are *in pari materia* and should be construed in the same manner.

The statutory context also supports construing the term "representative" in Section 114(a)(2) to mean designated EPA employees. The same term is used in Section 114(d) to designate the persons who are to give notice to state officials of an entry and inspection under Section 114(a)(2). The court of appeals correctly concluded Congress necessarily envisioned that this sensitive intergovernmental communication would be made by EPA officials, not private contractors.

A different provision, Section 114(c), relates to handling of confidential information and refers to "authorized representatives *of the United States*," not of EPA. (Emphasis added.) The use of the term "authorized representatives" in Section 114(c) serves an entirely different purpose than does the usage in Sections 114(a)(2) and 114(d). The broader reference in Section 114(c) allows EPA to pass confidential information to personnel of other federal agencies, to federal courts, and to state officials exercising transferred federal authority, notwithstanding restrictions which otherwise would be imposed by the Trade Secrets Act and the Federal Reports Act. EPA's argument that the broader usage in Section 114(c) should be imported into the entry and inspection provisions was properly rejected by the court of appeals.

No other federal agency has attempted to use private contractors to enter private premises and conduct searches and inspections. Based on centuries of experience, the English and American common law specifically has barred private persons from making governmental searches. These well-established usages and understandings necessarily formed the basis of Congress' legislative consideration of Section 114(a)(2). As Judge Siler wrote in the court of appeals, EPA's use of private contractors is "radically divergent" from past government usage and common-law principles, and to be valid "authority for such conduct should be clear from the Act itself or from legislative history." (684 F.2d 1192-1193, Pet. App. 41a.) There is no such authority.

ARGUMENT

I. DEFENSIVE USE OF COLLATERAL ESTOPPEL IS APPROPRIATE IN THIS CASE WHERE THE PARTIES INVOLVED AND THE RIGHT AT ISSUE ARE IDENTICAL TO THOSE IN THE PRIOR LITIGATION, AND THE CASE ARISES ON INDISTINGUISHABLE FACTS

The court of appeals properly considered this case to be controlled by the principles of collateral estoppel set out in *Montana* v. *United States*, *supra*, 440 U.S. at 153-

154.[13] Like *Montana*, this case concerns "defensive" use of collateral estoppel regarding a legal question which is "in substance the same as [in the prior litigation]." *Montana*, 440 U.S. at 155. Moreover, in *Montana* the parties to the prior and subsequent litigation were in practical effect the same. *Id.* at 154-155. In this case, they are identical. Also, the Court in *Montana* made a careful analysis of whether the controlling facts or law had changed significantly from the prior litigation. *Id.* at 155, 158-62. Here, the court of appeals undertook a comparable analysis and concluded that no such differences existed.

This case thus boils down to the question whether the *Montana* principles should be limited, so as not to apply in cases involving "recurring questions of public law."

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[13] In *Montana*, this Court outlined the general policies underlying collateral estoppel as follows:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions. *Montana*, 440 U.S. at 153-154.

The *Restatement (Second) of Judgments* § 27 (1982) defines the doctrine in terms that reflect these policies:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

See also *Southern Pacific R.R. v. United States*, 168 U.S. 1, 48-49 (1897); *Cromwell* v. *County of Sac*, 94 U.S. 351, 352-53 (1877).

No question has been raised here or in the Sixth Circuit concerning (1) EPA's full and fair opportunity to litigate in the Wyoming federal district court and the Tenth Circuit, (2) the actual litigation of the statutory contractor-search question in those courts, (3) the determination of the question in a valid and final judgment by those courts, and (4) the essentiality of such determination to the judgment of the Wyoming federal district court as affirmed by the Tenth Circuit.

EPA's Brief at 22-31.[14] The government's invitation so to limit *Montana* should be rejected, at least in the circumstances of this case. This Court's precedents, a uniform line of cases in the courts of appeals, and the *Restatement (Second) of Judgments* ("*Restatement*") all demonstrate that there is no basis for such a broad exception to the *Montana* principles, *where collateral estoppel is invoked defensively by a party to the prior suit.* One party should not be subjected to successive suits by another party regarding the same question or right, even if the persistent plaintiff is a federal agency.

A. Defensive Use Of Collateral Estoppel Where The Same Parties Were Subject To The Prior Judgment Is The Most Compelling Case For Invocation Of The Doctrine

Montana was a case in which this Court approved the *defensive* use of collateral estoppel against the government *by a party* to the prior litigation.[15] Contemporaneously, the Court decided *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), a case in which the Court approved *offensive* use of collateral estoppel by a non-party to the prior litigation. In so doing, the Court explored the differences between offensive and defensive use of the doctrine,[16] and noted that offensive use of collateral estoppel is not so readily applied as defensive use. As the Court

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[14] The government acknowledges that it is seeking a significant reassessment of *Montana*. See EPA's Brief at 30-31.

[15] *Montana* thus is a direct precedent for the decision in the instant case, as the court of appeals determined. See *supra*, at 9.

[16] The Court defined the two uses as follows:

> In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.
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> *Parklane*, 439 U.S. at 326 n.4.

observed, "offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does" (*id.* at 329), and offensive use has a greater likelihood of being unfair to the party against whom the doctrine is being invoked. See *id.* at 330-31.

In short, reservations applicable to offensive use of collateral estoppel do not pertain to defensive use, especially where the parties are the same. This Court, like other courts, accordingly has been more willing to apply collateral estoppel defensively.[17]

B. The Right Or Question At Issue Here Is In All Legally Significant Respects The Same As In *Stauffer I*

Each judge of the court of appeals separately concluded that the issue presented in this case was identical to that resolved in *Stauffer I*.[18] The government nonetheless argues that "this case is governed by the exception to the rule of collateral estoppel applicable to pure questions of law arising in successive actions on *substantially un*related claims." EPA's Brief at 15 (emphasis added). The few differences which exist, however, have no legal significance whatsoever. EPA's "demands" that private contractors be admitted to the plants to carry out inspec-

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[17] An earlier decision, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), involved defensive use of collateral estoppel where the parties to the subsequent litigation were not the same as those in the earlier litigation, *i.e.*, mutuality was not present. See *Parklane*, 439 U.S. at 327-29.

For a discussion of the sharp distinction drawn by courts of appeals between the two uses in the context of regulatory litigation involving the government, see *infra* at 26-28 & nn.23-26.

Notably, the question of collateral estoppel posed in *United States* v. *Mendoza*, No. 82-849, concerns *offensive* use of collateral estoppel where *mutuality of the parties is not present.*

[18] As Judge Jones commented, "[i]n the instant case, it is undisputed that the issue resolved by the litigation in *Stauffer I* is identical to the question raised in this appeal." (684 F.2d 1190, Pet. App. 34a.)

tions were strikingly congruent in time, subject matter, and factual context, as the court of appeals determined.

The exception at issue stems from *United States* v. *Moser*, 266 U.S. 236, 242 (1924), where it was formulated as follows:

> Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action *upon a different demand* are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.
>
> *Id.* (emphasis as supplied by the Court in *Montana*, 440 U.S. at 162).

The Court in *Montana* remarked that the scope of this exception "may be difficult to delineate." 440 U.S. at 163. It generally observed that preclusion may be inappropriate "when issues of law arise in successive actions involving unrelated subject matter" (*id.* at 162), and also looked to the alignment in time of the successive claims. *Id.* at 163. See also *Restatement*, § 27 at 264-65 (Reporter's Note);[19] *id.* § 28, comments b and c; and *id.* at 285-86 (Reporter's Note).

Here, the events giving rise to the legal issue were parallel in both time and subject matter. As Judge Weick pointed out, "[t]he facts in *Stauffer I* were identical to those in the instant case except they arose in a

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[19] The Reporter's Note to Section 27, at 264-65, states as a general proposition that—

> issue preclusion may apply even though the events involved in the two proceedings took place at different times (or the question was one of status or condition at different time periods) if the facts are sufficiently similar or identical for purposes of the applicable rule of law. See Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4417.

plant of Stauffer's at a different location." (684 F.2d 1179, Pet. App. 9a.) Both cases occurred early in 1980, at the advent of EPA's "overview inspection program" designed to audit state enforcement efforts. See *supra*, at 3, 6. Both inspections by contractors were planned in conjunction with that program. EPA had designated each of the contractors as its "representative" for purposes of entry under Section 114(a)(2) of the Act. In each instance, the contractors were accompanied by EPA and state officials who were themselves capable of conducting such inspections and who had actually conducted such inspections previously.[20] Stauffer each time welcomed inspection by the EPA and state officials. In each case, Stauffer attempted to negotiate an agreement to protect trade secrets, but in each case an administrative search warrant was issued on an *ex parte* basis before the negotiations had been resolved.

The differences concern only location (the two plants are in different states and thus in different EPA regions and different federal judicial districts) and the identity of the contractors involved.[21] Neither in *Stauffer I* nor in this case did the courts attach any legal significance whatsoever to these differences. There is, in short, a remarkable identicality to *Stauffer I* and this case, in time, subject matter, and factual setting. In sum, EPA has utterly no basis for its assertion that "the court of appeals . . . appears to have relied entirely upon the identity of parties and the common legal question." (EPA's Brief at 17.) To the contrary, after a detailed and careful comparative evaluation of the circumstances in the two cases, the court of appeals properly concluded

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[20] This circumstance, coupled with the others, led the courts in both *Stauffer I* and this case to believe that EPA was seeking a "test case." See *supra*, at 5 n.5 & 10, and *infra*, next page.

[21] EPA itself attached little importance to the identity of the contractors. In each instance, it provided no information regarding the nature of the contracting company, and very little material respecting the specific employees of the contractor who were involved. See Jt. App. Ct. Appls. 18-20, 37-38.

that EPA's demands were not "substantially unrelated" for purposes of the *Moser* exception. See *supra*, at 9.

Moreover, in this case of defensive use of collateral estoppel, EPA made the successive demands and had complete control over the forums and timing. EPA's brief refers to "coincidence," stating that "the fact that both inspections involve plants operated by respondent is pure coincidence" (EPA's Brief at 18), and also that "the government made no such tactical decision to engage in duplicative litigation." *Id.* at 20. The fact is, however, that in *Stauffer I* the Wyoming federal district court determined that "EPA's counsel apparently wanted to make this a test case." 14 Env't Rep. Cas. (BNA) at 1741 (¶ 3). And similarly in *Stauffer II*, as EPA in its brief protests, Judge Jones suggested "that EPA has deliberately embroiled respondent [Stauffer] in multiple litigation in order to 'test its policy decisions in more than a single circuit, in circumstances where the same defendant is used *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment.'" EPA's Brief at 21 n.11, *quoting* 684 F.2d 1192, Pet. App. 38a. Amazingly, at one point in EPA's brief it tries to shift the onus for the remarkable "coincidence" to Stauffer by saying that its efforts to defend itself by filing motions to quash the warrants gave rise to the successive disputes. EPA's Brief at 20.

The Sixth Circuit's analysis in this case is consistent with the manner in which other courts of appeals have applied the *Moser* exception, as explained in *Montana*. For example, in *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), the court had before it successive prosecutions by OSHA of citations against Continental Can for alleged violations of the agency's noise regulations. The court had no difficulty in determining that the same issue was in dispute and that the circumstances were sufficiently related to apply collateral estoppel defensively, even though different plants were involved. See *id.* at 595-96. Similarly, in *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979), the government

was collaterally estopped from assessing tax deficiencies because of its loss of a prior case against the taxpayer's son involving different transactions based on the same contract. See *id.* at 1344-1350. See also *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982) (IRS estopped from asserting a deficiency for 1971 tax year by prior judgment in case concerning 1967 tax year); *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980). (EPA collaterally estopped in enforcement action against pulp mill by prior judgment in state enforcement action).[22]

These recent cases, all decided after *Montana* and *Parklane Hosiery*, involve defensive use of collateral estoppel against the government. They thus deal with situations where, as here, the government controls the successive litigation. See also *Montana*, 440 U.S. at 163 (government chose forum and claims in both cases). In each case, the events at issue in the subsequent litigation were somewhat different from those in the prior case. In applying *Moser* as explained in *Montana*, the courts focused on the legal significance of the similarities and differences between the successive cases. See *Restatement*, § 28 at 286 (Reporter's Note), *quoted infra*, at 30 n.28.

Like the other courts of appeals in *Continental Can*, *Starker*, *Union Carbide* and *ITT Rayonier*, the Sixth Circuit in this case properly concluded that the exception formulated in *Moser* has no application where the same

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[22] In *Starker*, the court characterized the case as involving offensive rather than defensive use of collateral estoppel, presumably because the party urging estoppel was the plaintiff. The government, however, had initiated the case by assessing the tax deficiency.

Starker and *Union Carbide* are arguably inconsistent with *Divine* v. *Commissioner*, 500 F.2d 1041 (2d Cir. 1974), but *Divine* did not turn on any lack of relationship in the demands involved. Instead, *Divine* (decided before *Montana* and *Parklane Hosiery*) turned on "special factors relating to tax litigation." *Id.* at 1057 (Friendly, J., concurring and dissenting). See the discussion of *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948), in *Restatement*, § 27 at 265 (Reporter's Note).

question or right arises in successive litigation on related facts that differ in no legally significant respect.

C. Where Collateral Estoppel Is Invoked Defensively By A Party To The Prior Suit, The Government May Be Precluded From Relitigating A Potentially Recurring Question Of Public Law

Collateral estoppel may not be invoked where "special circumstances warrant an exception to the normal rules of preclusion." *Montana*, 440 U.S. at 155. The government argues strenuously here and in *United States* v. *Mendoza*, No. 82-849, that such special circumstances do exist—specifically, that "collateral estoppel should not be applied against the government to preclude [*re*]determination of recurring questions of public law." EPA's Brief at 22 (heading; capitals omitted). The government points to its unique functions in enforcing public laws, and argues that application of collateral estoppel to it "would freeze the development of the law." *Id.* at 24. This characterization and argument sweeps much too broadly. The government's special role in enforcing federal laws is beyond question, but that role does not exempt EPA or any other federal agency from application of collateral estoppel in any and all circumstances whatsoever. Instead, the court before which the successive litigation is pending should carry out its balancing calculus by including the government's role as simply one of the factors being evaluated. In the particular circumstances of this case, where collateral estoppel is being used defensively by a party to the prior suit, the government's role is outweighed by other factors, as the court of appeals found.

1. *Collateral estoppel applies where the government brings successive suits against the party who prevailed in prior litigation.*

It is instructive that the government's argument on this point proceeds largely on the basis of considerations and authorities pertinent to *offensive use* of collateral estoppel, often *by a non-party* to the prior litigation.

See EPA's Brief at 26, 32 & n.18.[23] Where, as here, collateral estoppel is being used *defensively by a party to the prior litigation*, courts of appeals have upheld its use notwithstanding the government's reliance on its special role as a countervailing factor.[24]

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[23] Those considerations apply to *United States* v. *Mendoza*, No. 82-849, but not to this case.

The *Restatement*, §§ 27-29, mentions but does not develop the distinctions between offensive and defensive use of collateral estoppel. See *id.* § 29, comments d and e, at 293-94. Instead, it iterates considerations which bear generally on applying the doctrine in both usages.

The leading decision by a court of appeals denying offensive use of collateral estoppel in a regulatory context is *Western Oil & Gas Ass'n* v. *EPA*, 633 F.2d 803 (9th Cir. 1980). Oil and gas companies and their trade association sought review of an EPA regulation designating certain areas of California as not meeting federal air quality standards. Judge Sneed's opinion for the court recognized specifically that "offensive" use of collateral estoppel was at issue (*id.* at 808-09) and that the government's interest in relitigation was a strong countervailing consideration insofar as *that use* was concerned. *Id.* The court considered that *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), discussed *supra*, at 24, was "not inconsistent" with *Western Oil & Gas* because *ITT Rayonier* involved defensive use of estoppel by a party to the prior case. 633 F.2d at 810 n.8. In this very same context, the court observed that "[w]e do not hold that an agency may never be bound by a prior determination." *Id.*

All of the decisions cited in EPA's Brief at 32 n.18 involve circumstances comparable to *Western Oil & Gas*, as EPA itself acknowledges in that footnote.

[24] The government acknowledges that the identity of the parties in the successive suits is a valid consideration in applying the doctrine. EPA's Brief at 26.

The *Restatement* continues to separate principles relating to relitigation "between the parties" (§§ 27, 28) from those concerning "Issue Preclusion in Subsequent Litigation with Others") (§ 29, heading). In effect, Section 29 of the *Restatement* sets out additional considerations that should be addressed before non-parties to the prior litigation may be allowed to invoke collateral estoppel. Much of the argument reflecting the *Restatement* in EPA's Brief rests on Section 29, and thus concerns the further considerations applied when non-parties seek to invoke the doctrine. See EPA's

The decision in *American Medical International, Inc. v. Secretary of HEW*, 677 F.2d 118 (D.C. Cir. 1981), illustrates these distinctions. There, the Health Care Financing Administration had denied reimbursement of certain costs that American Medical and some of its subsidiaries and affiliates had allegedly absorbed while furnishing health care to beneficiaries of the Medicare program. In a prior litigation in the Court of Claims, the reimbursability of one category of costs had been resolved against the government. The D.C. Circuit first addressed the question whether "federal relitigation of questions of national law with *new parties* in new circuits should be permitted." *Id.* at 122 (emphasis added). It concluded that in those circumstances, collateral estoppel should not be applied. However, the court then turned to the circumstances where a party to the prior suit was seeking to invoke collateral estoppel against the governmental party to the first suit. In that situation, the court opined that it ordinarily would apply the doctrine:

> The foregoing analysis [concluding collateral estoppel should not apply] intercepts only parties who did not participate in the initial suit. *If the government is litigating with the same adversary in both cases, an estoppel will petrify the law only as to that one party—obviously not an unjust result—and accordingly will work no preclusion generating national shockwaves.*
>
> *Id.* at 124 (emphasis added).

The court then evaluated whether other special circumstances should affect application of the doctrine.[25]

Brief at 26, citing the *Restatement* at § 29(7) and comment *i*. The commentary to the *Restatement* explicitly cautions that the exceptions to application of the doctrine are more rigorously applied in the case of non-parties. See Restatement, § 29, comment b, at 292-93.

[25] It happened that the prevailing party in the initial suit had been a subsidiary which was later merged into American Medical. In this unusual setting the court found that it would be unfair to apply one rule of decision to American Medical as successor com-

The analysis in *American Medical* of the general propriety of defensive use of collateral estoppel by parties to the prior litigation is in accord with the decision in the present case and with the decisions of other courts of appeals in *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979) (successive suits by OSHA alleging violations of its noise regulations), and *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980) (successive suits alleging violation of water pollution requirements).[26] In each case, a governmental agency had brought successive suits against the same private party regarding the same issue. In these situations, courts have considered that the government's valid interest in relitigating issues was outweighed by the private party's interest in not having to defend itself in successive suits regarding an issue previously resolved in its favor. As Judge Jones succinctly put the matter:

> While I do not favor precluding a federal agency's ability to test its policy decisions in more than a single circuit, in circumstances where the same defendant is sued *in seriatim* without the agency attempting to exhaust its appeals on the previous judgment, the equities favor application of collateral estoppel and not its abdication. Thus, in my opinion, application of the rule is proper.
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> (684 F.2d 1192, Pet. App. 38a.)

2. *Defensive use of collateral estoppel by a party to the prior litigation fosters fairness.*

The court of appeals correctly concluded that it would be fairer in this case to apply collateral estoppel than not to do so. See *supra*, at 9. The government argues here, as it did in the court of appeals, that applying collateral estoppel would be unfair because Stauffer would consequently enjoy a more advantageous position than other

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pany and another rule to the subsidiaries who had not been party to the initial case. 677 F.2d at 124.

[26] See also *supra*, at 23-24, discussing *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982), and *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979).

persons. EPA's Brief at 27. This argument proceeds from the implication that Stauffer fortuitously "happened to be involved in the prior case decided against the government" (*id.*), and ignores the uncontested facts (1) that EPA initiated both the first and the second cases against Stauffer, (2) that in the prior case EPA fully and fairly litigated the question at issue, and (3) that EPA lost. EPA in effect wants a second bite at the same apple, in a forum and setting of its own choosing. In contrast, under the approach adopted by the court of appeals, Stauffer is no more favored than any other party subject to regulation under the Act—all have an opportunity equivalent to that Stauffer had, to defend themselves in litigation on the question with EPA, fully and fairly.[27]

In these circumstances, the strong judicial interest in "conclusive resolution of disputes within their jurisdictions" (*Montana*, 440 U.S. at 153) comes most directly to bear. Conservation of judicial resources and protection against the expense and vexation of multiple lawsuits are weighty factors which do not just evaporate because the government is the plaintiff bringing the successive suits. See *id.*

Moreover, as Judge Jones correctly pointed out in the court of appeals, as a practical matter Stauffer's position is indistinguishable insofar as administration of the law is concerned from that of any other potentially affected party in the Sixth and Tenth Circuits. As he said, while EPA "*technically* retain[s] the power" to assert it has a

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[27] These same considerations were addressed by the District of Columbia and Seventh Circuits in *American Medical*, 677 F.2d at 124, and *Continental Can*, 603 F.2d at 595, with results which accord with the decision by the court of appeals in the present case. EPA's citation of the *American Medical* decision as supporting its position ignores the analysis by that court, quoted *supra*, at 27, and the fact that a corporate merger affected the result there.

Of course, other parties in litigation with EPA on the issue in the Sixth and Tenth Circuits would now have the advantage of being able to contend that *stare decisis* binds the court in determining the question.

right to use private contractors to conduct a search in those circuits, *stare decisis* in effect binds the courts in those areas to apply the law as announced in *Stauffer I* and *Stauffer II*. (684 F.2d 1191, Pet. App. 37a (emphasis in original).) Realistically, there is no "special private law" for Stauffer. EPA's Brief at 28. Instead, the law as interpreted in *Stauffer I* and *Stauffer II* applies to all persons in the Sixth and Tenth Circuits.

Whether Stauffer may invoke collateral estoppel when faced with a demand by EPA that private contractors carry out an inspection at a plant in another circuit would depend upon the degree of similarity of the new demand with the circumstances involved in *Stauffer I* and *Stauffer II*.[28] The case before the Court now is *Stauffer II*, however, and the determination regarding application of collateral estoppel depends on the circumstances at hand, not those that speculatively might arise in still further successive litigation between the same parties.[29]

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[28] Section 28 of the *Restatement* states the relevant exception in terms of the relationship of the successive demands (EPA's Brief at 27 sets out a partial quote of Section 28(2)):

> [R]elitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . . .
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws . . . .

The Reporter's Note to Section 28(2) observes that the resolution of a legal question "in a proceeding between two litigants is not binding on them for all time with respect to all claims that may arise between them." *Id.* at 286. Instead, the considerations of relationship that pertain to the *Moser* exception should be addressed in the subsequent case. *Id.*

[29] *E.g.*, the decision in this case need not necessarily resolve the hypothetical question posed by EPA's Brief at 29 n.14 regarding whether Stauffer could collaterally estop EPA from using private contractors to enter and inspect its plants within the Ninth Circuit, notwithstanding that Circuit's contrary decision in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981). The setting in which

Finally, it is sophistic to argue as EPA does that "[b]y engaging in a regulated business within the various judicial circuits, . . . respondent subjected itself to the possibility that it would become engaged in parallel litigation presenting a common legal question. . . ." EPA's Brief at 29. In establishing its business enterprise, Stauffer did not consciously consider that it would be subjecting itself to "test cases" initiated *in seriatim* by EPA. See *supra*, at 23. Despite the reference to "coincidence" in EPA's brief, the striking similarities in these cases and the circumstance that EPA on each occasion refused to conduct the inspection with its own qualified officials at least suggest that here, as in *Montana*, there was "a deliberate effort to pursue parallel litigation on indistinguishable claims." EPA's Brief at 30.

D. The Other Considerations Cited By EPA Do Not Affect Application Of Collateral Estoppel In This Case

EPA's Brief cites three other considerations as weighing against application of collateral estoppel: (1) the Solicitor General's discriminating selection of cases to bring to this Court for review, (2) the existence of the conflicting decision of the Ninth Circuit in *Bunker Hill Co.* v. *EPA*, *supra*, and (3) the fact that the question at issue in these cases arises under "our complex environmental laws." EPA's Brief at 24-25, 30-32. None of these factors affects application of collateral estoppel in this case.

Regarding the Solicitor General's commendable selectivity in bringing cases to this Court for review, the government proffers the observation that the Solicitor General typically cannot predict the nature of future litigation and thus cannot know the risk that an adverse judgment may be binding in future cases:

> At the time when the Solicitor General decides whether to authorize an appeal, or whether to seek

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EPA brought such a further successive demand would be determinative.

> review in this Court of an adverse judgment, it *typically* is impossible to determine whether future litigation will arise in a case involving the same party or a different party.
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> EPA's Brief at 30 (emphasis added).

This is not a *typical* case, however. At the time EPA's petition for rehearing was denied by the Tenth Circuit in *Stauffer I*, and further review could be had only in this Court, *Stauffer II* had not only already been brought, it was already pending on appeal in the Sixth Circuit. The Solicitor General had to know *in this particular case* of the actual existence, not just the future prospect, of litigation between the same two parties.[30]

Similarly, the existence of the conflicting decision in *Bunker Hill* should not affect Stauffer's ability to invoke *Stauffer I* in this successive litigation. In *Stauffer I* both EPA and Stauffer already had a full and fair opportunity to litigate the question involved *directly against each other* in a virtually identical context. The *Bunker Hill* decision itself neither added any new element to this context nor worked any other intervening change in it. See *Restatement*, § 28(2).

Finally, there is no principled basis for carving out environmental statutes from the application of normal principles of collateral estoppel. Compare *Continental Can*; *ITT Rayonier*; and *Western Oil & Gas Ass'n* v. *EPA*, with EPA's Brief at 31-32 & n.18.

II. SECTION 114(a)(2) OF THE CLEAN AIR ACT DOES NOT AUTHORIZE EPA TO DESIGNATE PRIVATE CONTRACTORS TO ENTER, SEARCH, AND INSPECT PLANTS

Section 114(a)(2) of the Clean Air Act authorizes entry and inspection of premises subject to regulation under the Act, in the following terms (emphasis added):

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[30] Generally, the Solicitor General's circumspection in seeking review might have a bearing on whether a *non-party* to the prior litigation could make *offensive* use of collateral estoppel, but for the reasons set out *supra*, at 25-28, it should not affect *defensive* use of collateral estoppel by the prevailing *party* to the earlier case.

> [T]he Administrator *or his authorized representative*, upon presentation of his credentials—(A) shall have a right of entry to, upon, or through any premises of such person [who owns or operates an emission source] or in which any records required to be maintained under paragraph (1) of this section are located . . . .

The question of statutory construction presented by this case is whether EPA may designate a private contractor as its "authorized representative" for purposes of entering, searching, and inspecting a plant.

A. Congress Used The Term "Authorized Representative" Of EPA In Section 114(a)(2) To Mean Only Specially Authorized Officers Or Employees

1. *The legislative history of the 1970 Amendments to the Clean Air Act demonstrates Congress' intent to accord entry authority only to designated government employees.*

The term "authorized representative" is not expressly defined in the Clean Air Act.[31] The legislative history of Section 114(a)(2), however, amply demonstrates Congress' intention that searches of private premises be performed only by properly authorized EPA employees.

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[31] EPA's argument that a "plain meaning" of the term includes private contractors is without foundation. An equally acceptable "plain meaning" of the terms would be that authorized representatives are a limited class of employees of EPA, *i.e.*, those employees authorized by the Administrator to conduct inspections. This alternative "plain meaning" better comports with the common law understanding of the persons capable of carrying out the governmental function of searches and inspections, and it has the advantage of being amply supported by explicit legislative history. See *infra*.

Notably, in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981), this Court rejected a definition of the term "representative" identical to that proffered by EPA here, based on an analysis of congressional intent and the context in which the term was used. Cf. EPA's Brief at 34 n.20. Also, EPA ignores the statutory context when it says the term "representative" as used in Section 114(a)(2) "does not carry any implication of an employment relationship." *Id.* at 34.

The entry provision in Section 114 was adopted as part of the Clean Air Act Amendments of 1970. The House and Senate versions of the provision used different terms to describe who had entry authority. The House bill consistently used the phrase "officers or employees." See H.R. 17255, 91st Cong., 2d Sess. § 112(f) (1970), *reprinted in A Legislative History of The Clean Air Amendments of 1970* ("*Air Leg. Hist.*") 923 (1974). The Senate bill, from which the final version of Section 114(a) was substantially taken, used the term "authorized representative." See S. 4358, 91st Cong., 2d Sess. § 116(a)(3) (1970), *reprinted in Air Leg. Hist.* at 570.

The Conference Report shows unequivocally that no difference in meaning was intended. The Report notes that the House bill "authorized entry into and inspection of suspected polluters' facilities by *DHEW investigative personnel.*" H.R. (Conf.) Rep. 1783, 91st Cong., 2d Sess. 47 (1970), *reprinted in Air Leg. Hist.* at 151, 197 (emphasis added). It describes the Senate version in identical terms, stating that "the Senate authorized entry and inspection by *DHEW personnel.*" *Id.* (emphasis added).[32] The entry provisions of the Senate bill were adopted by the Conference Committee as part of a package adoption of the Senate's more detailed and stringent federal enforcement mechanism. See *Air Leg. Hist.* at 197-98.[33]

[32] EPA's suggestion that the term "personnel" could itself include private contractors (EPA's Brief at 41 n.28) was properly rejected by the Tenth Circuit in *Stauffer I*. Employees of private contractors are not EPA's personnel; they are the private contractor's personnel. See 647 F.2d at 1078.

[33] EPA argues that the use of the Senate version evidences Congress' intent to grant broader entry rights than the House version would have allowed. EPA's Brief at 40. That conjecture is put to rest by the legislative history which refers to "DHEW personnel" in describing both versions. As the court of appeals concluded, "[a]lthough it is ordinarily presumed that a difference in language reflects a difference in meaning, when the legislative history shows that no difference was in fact intended, that presumption is rebutted." (684 F.2d 1184, Pet. App. 20a.) The Ninth Circuit's contrary ruling in *Bunker Hill* acknowledges but then dismisses the foregoing legislative history. See 658 F.2d at 1283-84.

There was no perceived substantive difference in the language used to describe the persons entitled to enter private premises. Thus, Congress had in mind only designated federal employees when it used the words "authorized representative" in Section 114(a)(2).

Because Section 114 was drawn largely from the Senate bill, the Senate's understanding of the term "authorized representative" is particularly relevant to determining its meaning in the final version of the 1970 Amendments to the Clean Air Act. The Senate used the term in a number of provisions besides Section 114(a)(2). In each usage the Senate consistently meant only selected employees chosen from the larger class of EPA officers and employees.

The clearest example appears in Section 209(a) of S. 4358, regarding the right of access to documents concerning motor vehicle manufacturing operations. The bill provided that auto manufacturers must, "upon request of an *authorized representative of the Secretary*, permit *such officer or employee*" to have access to certain records, reports and information. *Air Leg. Hist.* at 598 (emphasis added).[34]

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[34] Under the Act as amended in 1970, authority to enter automobile plants was established in Section 206(c), 42 U.S.C. § 7525(c), and access to records of auto manufacturers was provided in Section 208(a), 42 U.S.C. § 7542(a). Both sections give the necessary authority solely to officers or employees of EPA who are "duly designated by the Administrator." The enacted language was from the House bill (which used the term "officers and employees"), rather than the Senate bill (which used the term "authorized representative"). See *Air Leg. Hist.* at 200-01. EPA argues that Congress specifically selected the language in Sections 206 and 208 to give EPA narrower authority *vis-a-vis* auto manufacturers, compared to the more general entry authority conferred in Section 114(a)(2). EPA's Brief at 41-42 n.29. However, the use of different terms merely reflects their different antecedents. The Conference Report indicates that the House and Senate provisions regarding entry of auto manufacturers' plants were "essentially the same," and that the House bill was chosen because of differences in the extent of compliance testing and disclosure. *Air Leg. Hist.* at 200-202, 507, 923.

In the same vein, Section 116(a)(2) of the Senate bill[35] provided that whenever "the Secretary or an authorized representative of the Secretary" found that a standard under the Act was being violated, he should promptly issue an order requiring abatement of the violation. *Air Leg. Hist.* at 497. It is utterly inconceivable that the Senate intended private parties to have power as "authorized representative[s]" to issue abatement orders, the violation of which would expose the violator to substantial criminal penalties. Certainly nothing in the bill or the Senate report indicates that this was the Senate's intent. See *id.* at 421-22.

Finally, the Senate bill provided in Section 304 that private individuals could bring suit to enforce the Clean Air Act. Among the requirements for using Section 304 was that the Secretary and the "authorized representative of the Secretary, if any, in the field office responsible for the area in which the alleged violation occurs" be notified. *Id.* at 523. As with the other sections, the conclusion is inescapable that the Senate, when it used the term "authorized representative," was referring to an employee of EPA, specifically appointed by the Administrator.

2. Congress reconfirmed its intent to limit entry power to public employees in enacting the Water Pollution Control Act Amendments of 1972.

Shortly after the Clean Air Act Amendments of 1970 were enacted into law, Congress explicitly reconfirmed its intention to preclude forced entry by EPA contractors under both the Clean Air Act and the Clean Water Act. In 1972, Congress substantially amended the Clean Water Act, adding among other things, Section 308, 33 U.S.C. § 1318. This section is, for all relevant purposes, identical

[35] This paragraph is particularly relevant because the language of Section 114(a)(2) of the Act at issue in this case was taken from the immediately following subsection of the Senate bill, Section 116(a)(3). See *id.* at 497.

to Section 114 of the Clean Air Act.[36] The report of the Senate Public Works Committee, in discussing Section 308, states:

> It should also be noted that the authority to enter, *as under the Clean Air Act*, is reserved to the Administrator and his authorized representatives *which such representatives must be full time employees* of the Environmental Protection Agency. The authority to enter is not extended to contractors with the EPA in pursuit of research and development.
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> *Water Leg. Hist.* at 1481 (emphasis added).

The Committee also stated that the designated EPA employees were expected to use the power to force entry "judiciously." *Id.*

Because Section 308 of the Water Act was explicitly modeled after Section 114 of the Clean Air Act, the Senate Report provides a particularly pertinent aid to interpretation of Section 114 of the Clean Air Act. As the court of appeals concluded:

> [O]rdinarily, "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant" is entitled to little weight . . . . However, this is an exceptional case. The understanding of a later Congress, while not binding, is entitled to deference . . . . The Clean Air and Clean Water Acts are in *pari materia* with one another. . . . This is especially true when the Clean Water Act's section 308(a) was explicitly modeled after section 114(a)(2) of the Clean Air Act. . . .
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> Moreover, the Senate report on the Clean Water Act Amendments was authored a scant ten months after passage of the Clean Air Act, by the same Committee (Public Works) which considered the

[36] The Report of the Senate Committee on Public Works states that, with one irrelevant exception, "Section 308 establishes authority identical to the authority for such purposes contained in the Clean Air Act Amendments of 1970 . . . ." S. Rep. No. 414, 92d Cong., 1st Sess. 62 (1971), *reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972 ("Water Leg. Hist.")* 1480 (1973).

> Clean Air Act. Thus, in the circumstances of this case, it is proper to give the quoted statement great weight, even though a similar statement [made] years later might be of little value.

(684 F.2d 1187, Pet. App. 27a-28a, *quoting Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).)[37]

3. In the 1977 Amendments to the Clean Air Act, Congress continued to use the term "representative" in the context of entry to refer only to public employees.

In the 1977 Amendments to the Clean Air Act, Congress added Section 114(d), 42 U.S.C. § 7414(d), as a

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[37] To show the "hazards" of relying upon post-enactment legislative history, EPA's brief quotes the Report of the Senate Public Works Committee regarding S. 1480, 96th Cong., 1st Sess. (1979). EPA's brief fails to mention that that bill was never enacted. Instead, a materially different compromise bill was passed by the Senate as a substitute, and ultimately became the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Superfund"), 42 U.S.C. §§ 9601-9657. See 126 *Cong. Rec.* H 11,787 (daily ed. Dec. 3, 1980); 126 *Cong. Rec.* S 14,930, 14,988, 15,009 (daily ed. Nov. 24, 1980). Compare EPA's Brief at 42 n.30. Moreover, that statute's entry provisions were not modeled after the Clean Air Act in any respect whatsoever, and the report quoted in EPA's Brief was written ten years rather than months after the Clean Air Act Amendments of 1970. Finally, after the Report was issued but before the Senate passed the different substitute bill, senators serving on the Committee on Environment and Public Works recognized that the statement in the Report quoted by EPA was erroneous and brought that circumstance to the attention of EPA. Senator Alan K. Simpson wrote to then-Administrator Douglas M. Costle, stating:

> [T]he S.1480 Report is in error regarding Congressional intent with respect to the use of private contractors for inspection purposes under the Clean Air Act and Clean Water Act and, therefore, should not be relied upon by EPA in its internal administration and most certainly should not be cited as authority to federal courts.

Letter from Senator Alan K. Simpson to Douglas M. Costle (November 19, 1980) (Attachment B to Stauffer's Reply Brief in the court of appeals).

companion provision to Section 114(a)(2). Section 114(d) requires "the Administrator (or his representatives)" to give notice to state pollution control agencies of any federal "entry, inspection, or monitoring under paragraph (2) of subsection (a)." Judge Weick noted that the purpose of the notice "is to foster cooperation and consultation between the EPA and the states" and concluded that "Congress could not have intended to entrust this kind of sensitive intergovernmental communication to employees of private contractors." (684 F.2d 1184, Pet. App. 20a-21a.)[38] To the contrary, the term "representatives" in Section 114(d) "necessarily envisions EPA employees." *Id.*

Sections 114(a)(2) and 114(d) are sister provisions. Both deal with inspections, and Section 114(d) contains an explicit cross-reference to Section 114(a)(2). Furthermore, both refer to representatives of the EPA Administrator. Such a close relationship between the sections strongly supports the conclusion, reached by Judge Weick, that they be read consistently with each other, giving the term "representative" the same meaning in each.

4. Sections 114(a)(2) and (d) share a statutory context different from that of Section 114(c).

Section 114(c) of the Act provides that the Administrator of EPA may disclose confidential information to "other officers, employees, or authorized representatives of the United States" when necessary to carry out the provisions of the Clean Air Act. Seizing upon the disjunctive "or" in that phrase, EPA theorizes that as used in Section 114(c) the term "authorized representatives" must cover private contractors, because officers and employees are separately enumerated. Reading that analysis

[38] EPA responds by claiming that "it is more reasonable to *assume*" that Congress intended to rely on EPA's "prudence" in using its employees rather than contractors to provide the intergovernmental notice required by Section 114(d). EPA's Brief at 36-37 (emphasis added). There is no legislative basis for such an assumption.

into the "representative" phrase in Section 114(a)(2), EPA argues that Section 114(a)(2) must likewise cover private contractors. EPA's Brief at 35. The argument is flawed, however, because it overlooks the differences both in context and in language between the two sections.

Unlike other usages of "authorized representative" or "representative" in the Clean Air Act, Section 114(c) refers to a representative of someone other than EPA's Administrator. Section 114(c) expressly, and broadly, denotes "authorized representatives *of the United States*." (Emphasis added.) Congress had good reason to employ this different usage in Section 114(c), given the statutory context.[39]

In enacting Section 114(c), Congress was concerned that there would be occasions on which it should not be a criminal act for the Administrator to disclose confidential information to government officials and agents outside EPA—for example, to other federal officials such as Department of Justice attorneys, staff at agencies such as the Occupational Safety and Health Administration or the Consumer Products Safety Commission, or even federal judges. In addition, state officials exercising delegated or transferred functions under the Act would be "concerned with carrying out this Act" and thus persons to whom confidential information could be disclosed. Absent a specific statutory authorization for EPA to divulge confidential information to state officials or federal officials outside EPA, the constraints imposed by the Trade Secrets Act, 18 U.S.C. § 1905, and by the Federal Reports Act, 44 U.S.C. § 3508, would apply. See *Shell Oil Co.* v. *Department of Energy*, 477 F. Supp. 413, 432-36 (D. Del. 1979), *aff'd*, 631 F.2d 231 (3d Cir. 1980), *cert. denied*, 450 U.S. 1024 (1981).

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[39] Compared to Section 114(a)(2), Section 114(c) has entirely different antecedents in the Senate bill which produced the 1970 Amendments. Section 114(c) was originally Section 114(e) of the Senate bill, whereas Section 114(a)(2) and other provisions were derived from Section 116 of that bill. See *Air. Leg. Hist.* at 197, 562-63, 570.

Against this background, Congress in drafting the Clean Air Act used the term "authorized *representatives of the United States*" to describe the other officials to whom EPA could *disclose* confidential information. It was merely adopting the terminology which it had used in earlier enactments with respect to disclosure of confidential information.[40] Instructively, language virtually identical to that of the Clean Air Act appears in Section 308 of the Clean Water Act, 33 U.S.C. § 1318, where Section 308(a)(B) provides that the Administrator's "representative" (*i.e.*, a designated employee—see *supra*, at 37) may enter and search a plant, while Section 308(b) provides that confidential information may be disclosed to other "representatives of the United States." Later statutes have continued to use this terminology respecting disclosure.[41]

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[40] See, *e.g.*, 15 U.S.C. § 1193(c) (under the Flammable Fabrics Act, confidential information may be obtained by "the Secretary or his representative" and may be disclosed to "other officers or employees" concerned with carrying out the Act); 43 U.S.C. § 236i(e) (Radiation Control for Health and Safety Act of 1968: same language); 29 U.S.C. § 664 (Occupational Safety and Health Act: same language).

[41] For example, in the Energy Supply and Environmental Coordination Act of 1974, Congress provided for the release of confidential information to any "delegate" of the Federal Energy Administrator or to other agencies when necessary to carry out their statutory duties. 15 U.S.C. § 796(d). See also Trade Act of 1974, 19 U.S.C. § 2155(g)(1)(A)(i) (disclosure to "officers and employees . . . designated by the United States Trade Representative"); Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. § 5916 (disclosure to any "delegate" of the Administrator or to heads of other federal agencies). The use of the term "delegate" is instructive in that it further illustrates the traditional congressional understanding that the terms "representative" and "delegate" are synonymous and refer to designated public employees.

Only recently has Congress provided for release of confidential information to private contractors. In Section 14 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2613, and Section 15 of the Federal Pesticide Act of 1978, 7 U.S.C. § 136h, Congress explicitly authorized EPA to give contractors access to confidential information. In both instances, Congress also imposed criminal

In sum, it is crucial that Section 114(c) broadly refers to "authorized representatives of the United States," and not to authorized representatives of EPA as do the other references to representatives in the Clean Air Act. There is no reason whatsoever to assume that the Administrator's "representative" in Sections 114(a)(2) and (d) is to be functionally equivalent to the other "representatives of the United States" in Section 114(c).[42]

B. EPA's Current Arguments Regarding Section 114(a)(2) Are Not Entitled To Any Deference Whatsoever

In interpreting Section 114(a)(2), this Court is dealing with a subject which is within its own special area of competence. Deference to EPA's views is not appropriate. EPA has no congressionally conferred authority to determine those persons entitled to enter and search plants. The question presented is a legal one involving the extent of EPA's statutory authority, and no technical or scientific expertise is involved.[43] Also, the expressly contrary

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sanctions for improper release of confidential information by such private parties. See 15 U.S.C. § 2613(d)(2); 7 U.S.C. § 136h(f).

[42] In the preamble to its confidentiality rules, EPA, in discussing the relationship between Section 114(c) and the entry provisions of Section 308(a) of the Clean Water Act (which is identical to and modeled after Section 114(a)), noted that "the term 'authorized representatives' is used in a different context and in a semantically different manner" in the two sections. 41 *Fed. Reg.* 36,923 at ¶ 69 (1976).

In rejecting EPA's argument, Judge Weick observed that "[t]o apply the same meaning to 'representative' in those sections would lead to the absurd result that only the Administrator and employees of private contractors could make pollution inspections, and EPA employees [since they are not separately enumerated in Section 114(a)] could not." (684 F.2d 1185, Pet. App. 229.)

EPA's mention of the delegation authority in Section 301(a) of the Act (EPA's Brief at 36 n.22) is unavailing because such delegation may be made by the Administrator *only* "to any officer or employee of [EPA]". See also *supra*, at 35 n.34 (authority in Section 206(c) for officers and employees to enter automobile plants).

[43] See, *e.g.*, *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970); *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

legislative history shows that deference is particularly inappropriate here.[44]

Moreover, the statutory construction urged by EPA in this litigation is not a long-standing, publicly-documented agency position which would be entitled to weight.[45] The Agency's position on Section 114(a)(2) plainly has been inconsistent; the most contemporaneous construction of the statute contradicts the interpretation now proposed by EPA.[46]

The court of appeals correctly concluded that there is no foundation to EPA's suggestion that Congress has somehow ratified EPA's practice of using private contractors to force entry and inspect plant premises. EPA's Brief at 44-45 & n.32. At the time it amended the Act in 1977, Congress was not, and could not have been, aware of EPA's use of contractors to force entry by warrant. EPA had not yet adopted the practice. See *supra*, at 3. For Congress to ratify agency actions through appropriation acts, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex Parte Endo*, 323 U.S. 283, 303

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[44] See, *e.g.*, *Rowan Companies, Inc.* v. *United States*, 452 U.S. 247 (1981) (Treasury regulations invalid as improperly interpreting statute); *Zuber* v. *Allen*, 396 U.S. 168, 192-193 (1969).

[45] See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 140-145 (1976) (administrative interpretation rejected because it was not contemporaneous with passage of the relevant legislation and it conflicted with earlier interpretations by EEOC and other indicia of the proper interpretation of the statute).

[46] The earliest interpretation by EPA of Section 114(a)(2) is an internal memorandum which concludes that "the term 'authorized representative' is used synonymously with officers and employees of EPA for purposes of entering only, and *cannot be delegated to contractors* . . . ." (Jt. App. Ct. Appls. 124, 128 (emphasis added).) Two later EPA memoranda (Jt. App. Ct. Appls. 160, 164) reached an opposite conclusion by failing to consider the legislative history of the Clean Air Act and by relying erroneously on the trade-secret disclosure language of Section 114(c). These later internal agency statements lack any reasoned analysis which would entitle them to deference. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287-89 & n.5 (1978).

n.24 (1944). EPA's budget requests, cited in EPA's Brief at 45 n.32, for "field sampling of atmospheric emissions," contained in a 35-page list of Agency contracts, hardly alerted Congress to any use of private contractors for entry, search, and inspection purposes under administrative search warrants.[47] These requests could have (and presumably did) relate to research and development functions for which EPA is authorized to award contracts.[48]

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[47] *Agriculture-Environmental and Consumer Protection Appropriations for 1973: Hearings Before a House Subcomm. on Appropriations of the Comm. on Appropriations*, 92d Cong., 2d Sess., Pt. 5, at 471-506 (1972).

[48] In fact, EPA has no evident authority in the Clean Air Act to retain and pay contractors for anything other than research and development programs. A general enabling statute, 5 U.S.C. § 3109(b), authorizes federal agencies to employ contractors, if the agency has specific statutory authorization to do so. The only authorization for use of contractors under the Clean Air Act is Section 103, which allows the Administrator to "establish a national research and development program for the prevention and control of air pollution," and to "contract with public or private agencies, institutions, and organizations, and with individuals" to carry out that program. 42 U.S.C. § 7403(a), (b)(4). Thus, "research and development" are the *only* purposes for which employment of contractors is authorized under the Clean Air Act.

This limitation on the use of contractors is understandable. Since 1955, the Executive Branch has recognized that private contractors should be used to provide commercial or industrial products and services, but not to carry out any inherently governmental functions. See Office of Management and Budget ("OMB") Circular No. A-76, ¶ 4 (revision four, March 29, 1979) (reprinted as Attachment A to Stauffer's Brief in the court of appeals). In Circular No. A-76, OMB states that "[c]ertain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees." *Id.* at ¶ 4.b. Among those "governmental functions" are "regulation of the use of space, oceans, navigable rivers and other natural resources," and "regulation of industry and commerce, including food and drugs." *Id.* at ¶ 5.f.(1). OMB Circular No. A-76 was issued initially in 1966. When Congress added Section 114 to the Clean Air Act in 1970, it certainly was aware of the Circular and of earlier Bureau of the Budget Bulletins issued in 1955, 1957, and 1960 which also addressed the government's private-contractor policy.

C. Strong Common Law Considerations Support A Statutory Construction Denying Authority For Contractors To Enter And Search Private Premises

Exercise by private parties of governmental power to enter, search, and inspect private premises would be an extraordinary break with a strong and consistent common law tradition to the contrary. In the court of appeals, both Judge Weick and Judge Siler considered that an interpretation of the statute which sanctioned such an authority should be accepted only if Congress has provided an explicit mandate for such a result in clear and unambiguous language. (684 F.2d 1189, Pet. App. 33a (Judge Weick); 684 F.2d 1192-93, Pet. App. 41a (Judge Siler).)[49]

1. *Explicit authority is necessary for searches by contractors given the strong common law tradition that only government officers or employees can execute searches on private premises.*

The long-standing common law tradition is that searches should be carried out only by public officials; private citizens are precluded from obtaining warrants and entering private premises.

This common law understanding was well established by 1661, when a Proclamation issued by King Charles II specified that "warrants be always directed to some Constable, or other known Legal Officer . . . ." King Charles II, Proclamation of 17 January 1661, *reprinted in* M. Smith, *The Writs of Assistance Case* 24 (1978).[50] Writing at about the same time, Sir Matthew Hale, a prominent English jurist, noted that search warrants were infringements on the rights of the citizens which had to be tolerated in certain circumstances, and observed that "[t]hey ought to be directed to constables and other public officers, whereof the law takes notice, and not to pri-

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[49] See also *United States* v. *Bailey*, 444 U.S. 394, 415-16 n.11 (1980); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879).

[50] The Proclamation, issued shortly after the Restoration, addressed the need to search for arms held by insurrectionists.

vate persons . . . ." 2 M. Hale, *History of the Pleas of the Crown* 150 (1st American ed. 1847) (originally published in 1678). The notable exception to this English common law tradition arose in connection with Writs of Assistance, and the American colonists had great difficulty with this exception.[51]

A Writ of Assistance did not exist in common law; it was established by the British Act of Frauds of 1662. That Act authorized any person designated by the Exchequer, whether public official or private citizen, to undertake searches and to seize goods, but it also required public officials to accompany the private individuals undertaking searches.[52]

The American colonies reacted sharply to attempts to use such Writs of Assistance.[53] Based on John Adams' Abstract of a 1761 argument before the Superior Court of Massachusetts Bay,[54] it is evident that one of the

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[51] *See* Dickerson, *Writs of Assistance as a Cause of the Revolution*, in *The Era of the American Revolution* 45 (R. Morris ed. 1939).

[52] Section 5(2) of that Act provided:

> And it shall be lawful to or for *any Person or Persons*, authorized by Writ of Assistance under the Seal of His Majesty's Court of Exchequer, *to take a Constable, Headborough or other Publick Officer* inhabiting near unto the Place, and in the Daytime to enter, and go into any House, Shop, Cellar, Warehouse or Room . . . there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed . . . .
>
> Act of Frauds of 1662, 14 Char. 2d, *reprinted in* M. Smith, *supra*, at 25 (emphasis added).

The Writ was used to enforce customs laws. In 1661, Charles II had "made over future [customs] duty receipts to private contractors in return for advances of ready cash." M. Smith, *supra*, at 27.

[53] "American histories without exception list writs of assistance as one of the active causes of the American revolution." Dickerson, *supra*, at 40. Furthermore, it is recognized that the colonial experience with the writs of assistance was the predominant reason for the enactment of the Fourth Amendment. See *id.* at 43.

[54] This Court has recognized the significance of this Massachusetts Bay case, noting that "[this] famous debate . . . was perhaps

major objections to the writ was the broad class of persons that could be authorized to conduct searches:

> [T]he writ is UNIVERSAL, being directed "to all and singular justices, sheriffs, constables and all other officers and subjects etc." so that in short it is directed to every subject in the king's dominions; every one with this writ may be a tyrant . . . .
>
> John Adams' Abstract of James Otis' Argument, *reprinted in M. Smith, supra*, at 553-54.

With the demise of English rule in the American colonies, the use of this writ also died. Correlatively, nineteenth century American treatises continued to acknowledge the common law understanding that private citizens did not have the authority to conduct searches.[55]

In sum, the construction urged by EPA is in derogation of hundreds of years of common law. Had Congress desired to depart from centuries of precedent to authorize inspections by private parties, it would have done so in unmistakable terms.

2. On the sole occasion when Congress has granted authority to designate private contractors to carry out searches, it did so explicitly.

To our knowledge, no regulatory bodies other than EPA use, or have even attempted to use, private parties in carrying out administrative inspections. For example, the Mine Safety and Health Administration uses only government employees in conducting mine inspections,[56]

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the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country." *Boyd* v. *United States*, 116 U.S. 616, 625 (1886).

[55] See, *e.g.*, T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 305 (1868) (search warrant should be directed "to the sheriff or other proper officer, and not to private persons"); C. Tiedemann, *A Treatise on the Limitations of the Police Power in the United States* § 127 at 461-462 (1886) (search warrant "must be issued to an officer of the law, and never to the complainant").

[56] Telephone conversation with Ronald Schell, Chief, Office of Technical Compliance & Investigation.

although its underlying Act provides that entry may be made by "authorized representatives" of the Secretary. 30 U.S.C. § 813(a). The Public Health Services Act uses the term "officers or employees duly designated by the Secretary," 42 U.S.C. § 263i(a), in authorizing entry, and in a subsequent provision on prohibited acts refers to failure to permit access "by the Secretary or any of his duly authorized representatives." 42 U.S.C. § 263j (a)(3).[57]

The only instance in which Congress has extended power to private contractors to force entry is the Resources Conservation and Recovery Act. As amended by the Solid Waste Disposal Act Amendments of 1980, entry authority is extended to "officers, employees or representatives" of EPA as well as state officials. 42 U.S.C. § 6927.[58] Congress added the term "representatives" for the specific purpose of encompassing private contractors. The Conference Report on the 1980 Amendments, H.R. Rep. No. 1444, 96th Cong., 2d Sess. 35 (1980), states

[57] Other statutory grants of entry power to agencies refer specifically to governmental officers and employees. *E.g.*, Occupational Safety and Health Administration—29 U.S.C. § 657(a) ("Secretary" of Labor authorized to enter); Consumer Product Safety Commission—15 U.S.C. § 2065(a) ("officers or employees duly designated by the Commission"); Food and Drug Administration—21 U.S.C. § 372(a) ("officers and employees" or "health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department"); Treasury Department—18 U.S.C. § 923(g) ("Secretary" regarding firearms), 26 U.S.C. § 5741 ("internal revenue officer" regarding tobacco products), 26 U.S.C. §§ 7601, 7602, 7606 ("Secretary" regarding taxes and taxable items); Interstate Commerce Commission—49 U.S.C. § 11144 ("Commission, or an employee designated by the Commission"); Coast Guard—14 U.S.C. § 89(a) ("commissioned, warrant, and petty officers").

[58] Prior to the 1980 Amendments, the Act had provided power to force entry for inspection purposes only to an "officer or employee of the Environmental Protection Agency, duly designated by the Administrator" or a "duly designated officer [or] employee" of a similar state agency. 42 U.S.C.A. § 6927 (West 1977 ed.). The 1980 Amendments also added language creating a similar right of entry for purposes of conducting certain studies. See 42 U.S.C. § 6921 (b)(3)(B)(ii)(I).

that "the Conferees believe that the expanded authority to use private contractors or representatives for inspection purposes must be used judiciously, avoiding the use of contractors who have conflicts of interest." See also H.R. Rep. No. 191, 96th Cong., 1st Sess. 9-10 (1979).

In passing the 1980 Solid Waste Disposal Act Amendments, Congress did not abrogate the common law without providing special safeguards. Congress imposed criminal penalties on private contractors who improperly disclose confidential information.[59] See 42 U.S.C. § 6921 (b)(3)(B)(ii)(II). The criminal penalties are equivalent to those enforced against EPA employees under the Trade Secrets Act, 18 U.S.C. § 1905. In contrast, nowhere in the Clean Air Act are private parties subjected to any criminal penalties for disclosure of confidential or trade secret information.

Seeking to fill this void regarding the Clean Air Act, EPA points to EPA's contract with PEDCo employees as well as to EPA and general governmental confidentiality regulations. EPA's Brief at 46-47.[60] EPA claims that those provisions are "sufficient protection against

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[59] As a legal matter, outside contractors, who are not employees of EPA, are not subject to the criminal sanctions of the Trade Secrets Act, 18 U.S.C.A. § 1905, which bars unauthorized disclosure of trade secrets and other proprietary information in the hands of officers and employees of the United States. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). Nor are private contractors restricted by the Federal Reports Act, 44 U.S.C. §§ 3501-3512, which governs interagency transfers of confidential information. See *Shell Oil, supra.* Independent contractors are not government employees for purposes of civil suits under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), or for purposes of a direct constitutional claim. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[60] EPA's confidentiality regulations, 40 C.F.R. § 2.301 (1982), are not a suitable substitute for statutory safeguards because they (1) allow the release of "emission data" under a definition broader than the statutory mandate, (2) contain insufficient limitations upon the passing of information to second contractors or subcontractors, (3) raise problems of third party enforcement, (4) cannot be enforced by criminal sanctions, and (5) generally do not

disclosure."[61] *Id.* at 47. However, the action of Congress in specifically providing criminal sanctions under the Solid Waste Disposal Act Amendments disproves any such hypothesis.[62]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August 12, 1983

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offer the protection that can be obtained from a properly drafted non-disclosure agreement or from criminal sanctions.

[61] Of course the best possible protection against disclosure is not to divulge the proprietary information in the first place. After the contractor has the information, a plant owner such as Stauffer would have difficulty subsequently determining whether the information had been disclosed or used for the contractor's own gain. Opportunities for inadvertent misuse definitely are present. During the hearing in this case, the district court remarked "[t]hat [PEDCo's concurrent engineering design and construction work] concerned me more than anything else. The fact that PEDCo in addition to being a contractor that does examinations and compliance inspections appears to be a design engineer and available for working for some of your competitors." Jt. App. Ct. Appls. 310. Indeed, PEDCo has been a consultant to a number of Stauffer's competitors. See Jt. App. Ct. Appls. 133, 137, 152-155. The court of appeals thus properly concluded that PEDCo "may have an axe to grind." Compare 684 F.2d 1193, Pet. App. 43a, with EPA's Brief at 46 n.33.

[62] There is no substitute for the deterrent effect of criminal sanctions against the misuse of confidential information. The criminal sanctions under these statutes apply *in addition* to requirements contained in regulations governing the release of information to contractors.

Office - Supreme Court, U.S.
FILED
OCT 25 1983
STEVAS,
CLERK

No. 82-1448

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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v.

STAUFFER CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I

Our threshold argument in this case is that the United States may not be collaterally estopped from litigating a question of statutory interpretation governing the relationship between a federal agency and members of a large class of businesses subject to the agency's jurisdiction by the judgment, rendered by the court of appeals for a different circuit, in a different case involving the same private party but arising from an unrelated transaction. As in No. 82-849, *United States* v. *Mendoza*, the respondent has not taken issue with our central contentions.[1] The thrust of respondent's answering argument instead is that our analysis, while applicable in other

[1] Copies of our opening brief and reply brief in *Mendoza* have been provided to respondent.

contexts, should not prevail where collateral estoppel is being used defensively by a party to the prior suit (Resp. Br. 25-26).

The distinction drawn between defensive and offensive use of collateral estoppel is, we submit, unsound (see pages 6-9, *infra*). In addition, the amorphous "balancing calculus" that the respondent proposes (Br. 25) to govern the scope of the expansive collateral estoppel doctrine it favors is incapable of providing the certainty and foreseeability of outcome that is necessary if judicial economy is to be achieved in governmental litigation.[2] Adoption of the rule advocated by respondent would, instead, foster protracted litigation concerning the various factors that enter the balancing process. By contrast, application of traditional rules of stare decisis, coupled with due regard for an analytical force of the decisions of sister courts, will promote efficient resolution of recurring legal controversies. In this case, for instance, the conflicting decisions of the Ninth and Tenth Circuits neatly framed the considerations to be addressed by the Sixth Circuit. Artificially elevating one of these two decisions above the other did not actually yield any judicial economy.

1a. Respondent claims (Br. 20-25), initially, that this case is governed by the "same 'demand'" doctrine that limits the "unmixed questions of law" exception to the doctrine of collateral estoppel, arguing that, as in *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979), the "legal demands" of *Stauffer I* and *Stauffer II* were "closely aligned in time and subject matter." As we explained in our opening brief (at 15-22), however, while considerable uncertainty attends the "same 'de-

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[2] We think it telling that respondent is unwilling to take an unequivocal position on the elementary hypothetical question we have posed: whether EPA is bound by *Stauffer I* to disregard the law of the Ninth Circuit established in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981), in dealing with Stauffer's plants located in the Ninth Circuit. See Resp. Br. 30 & n.29.

mand' " rule, it necessarily is limited to circumstances in which the successive cases are alike in material respects in addition to the underlying legal issue. Respondent claims (Br. 21-22) that *Stauffer I* and *Stauffer II* were alike in material respects and argues that the distinguishing features we have noted (U.S. Br. 17-18) lack legal significance. In our view, the situation is precisely the contrary. Most of the factual similarities adduced by respondent (Br. 22) establish no genuine identity between the cases that goes beyond the question presented itself.[3] Other common features of the two cases are simply irrelevant, for they shed no light upon the pure question of statutory interpretation presented.[4]

Immaterial similarities such as those relied upon by respondent cannot be determinative for purposes of applying the "same 'demand' " rule, lest the unmixed questions of law doctrine be swallowed by its limiting exception. As noted in our opening brief (at 18 n.10), the Restatement (Second) of Judgments (§ 28 illustrations 1 and 2, at 276 (1982)) treats as unrelated "demands" successive personal injury damage actions brought against a municipality by a single plaintiff arising out of separate tortious acts, teaching that a judgment for the municipality on sovereign immunity grounds in the first does not bar the plaintiff from arguing in the sec-

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[3] For example, the facts that EPA had in each case designated the contractor-representative in question as its "representative" for purposes of the pertinent stationary source inspection provisions of the Clean Air Act, and that Stauffer "welcomed" inspection by government employees who accompanied the contractor-representatives, while barring the latter, do not establish any significant identity between the two cases. Rather, without these facts the common legal question simply would not be presented.

[4] *E.g.*, the fact that each case arose out of EPA's overview inspection program; that respondent sought in each case to condition accession to the inspection upon execution of a confidentiality agreement it had prepared; and that the search warrant was issued on an ex parte basis.

ond that sovereign immunity should be rejected. We submit that it should make no difference for this purpose that both actions arose out of traffic accidents involving municipal personnel, or even that both accidents occurred on the same date, and involved a similar kind of alleged negligence. Obviously, none of these factual similarities sheds any light upon the purely legal question whether sovereign immunity should continue to be recognized. In the present case, too, the issue is purely legal in character, and may be determined without regard to the factual context. Moreover, the features that distinguish *Stauffer I* and *II*—their genesis in separate transactions, arising independently through the administrative process, and subject to determination in different courts—underscore the justification for determination of the underlying legal issue on its merits.

b. Respondent also argues (Br. 19, 23, 31) that this case involves deliberate manipulation of forums and timing of litigation so as to enable the agency to relitigate the underlying legal issue. As we have explained (U.S. Br. 20-21, 30), that appears to have been a vice of the government's litigation conduct in *Montana* v. *United States*, *supra*, as it was perceived by the Court. But respondent's claim that such tactics were employed here is utterly without foundation in the record or otherwise. Respondent misrepresents (Br. 23) the import of the *Stauffer I* district court's remark that "EPA's counsel apparently wanted to make this a test case." Relitigation was not, and obviously could not have been, an issue in *Stauffer I*; the *Stauffer I* court plainly meant only to observe that EPA chose to stand firm on its legal position rather than to accede to respondent's insistence that agency employees make the inspection alone. *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737, 1741 (D. Wyo. 1980). Moreover, the district court actually found that the inspection site in *Stauffer I* "was

chosen * * * on the basis of general oversight selection criteria." *Id.* at 1739.

The record in this case similarly suggests only that the inspection that gave rise to this case arose out of the routine operation of EPA's oversight inspection program (Pet. App. 44a-45a). And given the nature of that program, which covers approximately 10% of all major stationary sources of air pollution annually (see U.S. Br. 2 n.1), and the extent of respondent's operations (see U.S. Br. 29 n.14), it would have been surprising if several of respondent's facilities were not subject to oversight inspection within a period of a year.

Respondent nonetheless echoes (Br. 23) Judge Jones' suggestion (Pet. App. 38a) that the maintenance of this case entails deliberate relitigation. But both respondent and Judge Jones ignore the fact that the attempt to inspect respondent's Mt. Pleasant, Tennessee, facility antedated the initial inspection attempt at respondent's Wyoming plant and that this case actually reached the court of appeals on respondent's appeal taken from the district court's decision favoring the government, which was rendered *before* the Tenth Circuit ruled on the merits in *Stauffer I*. And as respondent emphasizes (Br. 8 n.8), there was no predicate for its collateral estoppel claim until the court of appeals ruled in *Stauffer I*.[5] Under respondent's view, the United States apparently was required to single out one of respondent's plants as the subject of a test case, and to immunize all of respondent's other facilities from the agency's uniformly applied interpretation of the Clean Air Act inspection provisions during that litigation, presumably until a ruling had been rendered on the issue by the highest available court. Thus, although this case, like *Montana* itself, involves litigation commenced roughly contemporaneously, that pattern results here from even-handed administration

[5] Thus respondent's collateral estoppel argument seeks, anomalously, to overturn the district court decision below on preclusion grounds not in being when the district court ruled.

of the law as to all similarly situated persons, rather than the seemingly manipulative relitigation disapproved in *Montana*.

2. Briefly stated, our argument is that, unlike its application to issues of law that arise in purely private litigation, invocation of collateral estoppel against the government to preclude determination of a question of law affecting the rights or duties of a class of similarly situated persons would undermine the existing system for evolution of the public law. The result would be to encourage excessive appellate litigation on questions of first impression, while precluding appeal on recurring questions of substantial importance (see U.S. Br. 22-26). Cf. *Michigan* v. *Long*, No. 82-256 (July 6, 1983), slip op. 10 n.8. And we submit that, as applied where there is an identity of parties in successive lawsuits, issue preclusion would foster unequal treatment of persons similarly situated, and compromise the government's salutary practice of seeking certiorari only selectively, in those instances where the Court's traditional criteria for further review appear to be satisfied (see U.S. Br. 26-31). Respondent does not suggest that these considerations are without force. Nevertheless, in the "balancing calculus" respondent proposes (Br. 25), they are claimed to be outweighed by the "defensive" nature of the estoppel applied by the court of appeals (Br. 19-20, 28-31). Neither respondent's general argument nor its characterization of this case as a defensive application of collateral estoppel withstands examination.

a. Contrary to respondent's argument (Br. 19-20), while offensive use of collateral estoppel stands, in certain respects, on a less favored footing than its defensive counterpart, see *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329-331 (1979), it does not follow that the law embodies an uncritical preference for defensive applications.[6]

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[6] In its "defensive" application collateral estoppel bars "a plaintiff * * * from asserting a claim that the plaintiff had previously

To be sure, *Parklane Hosiery* reviews in some detail particular circumstances that create a special potential for unfairness in offensive applications of collateral estoppel. The Court held that when any of these circumstances—or any other factor—actually produces unfairness in any given case, offensive issue preclusion is not to be permitted. *Id.* at 331. But the detailed discussion in *Parklane Hosiery* of the hazards of offensive collateral estoppel is merely an application of the general rule, equally applicable to defensive uses, that collateral estoppel should not be applied where "special circumstances warrant an exception to the normal rules of preclusion." Compare *Montana* v. *United States*, 440 U.S. at 155, with *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 331. Thus no general rule uncritically favoring collateral estoppel in defensive uses can be extracted from *Parklane Hosiery*; nor need unfairness resulting from such use be countenanced on the authority of that case.[7]

Rather than mechanical reliance upon labels such as "offensive" and "defensive," *Montana* and *Parklane Hosiery* require examination of the actual effect of issue preclusion in a particular class of cases. That is precisely what we have done here by focusing attention upon the unique dynamics of government litigation on recurring issues of law and the inequity that would result from issue preclusion in these circumstances. Respondent answers

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litigated and lost against another defendant." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329 (1979). In its "offensive" use "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Ibid.*

[7] In *Parklane Hosiery*, the Court described its approach as "essentially" that of the Restatement "which recognizes that 'the distinct trend if not the clear weight of authority is to the effect that there is no intrinsic difference between "offensive" as distinct from "defensive" issue preclusion * * *.'" 439 U.S. at 331 n.16, quoting Restatement (Second) of Judgments § 88 reporter's note at 99 (Tent. Draft No. 2, 1975) (presently Restatement (Second) of Judgments § 29 reporter's note at 299 (1982)).

(Br. 28-31) that application of collateral estoppel is required in the circumstances of this case to avoid unfairness to it. But that argument rests almost entirely upon its unsupported claim that this case involves manipulative relitigation. See pages 4-6, *supra*. In addition, respondent urges (Br. 29-30) that collateral estoppel will not produce inequity among similarly situated persons in this case, because the Sixth Circuit went on to reach the merits here. But that is true only because of the unusual dual holding of the court of appeals, which is the product of the court's failure to follow its collateral estoppel holding to its logical conclusion, rather than a result of collateral estoppel itself.

b. In any event, it is far from clear that this case is properly regarded as a defensive application of collateral estoppel. *Stauffer I* actually arose on respondent's motion to quash. See 14 Env't Rep. Cas. at 1737. And this case arose upon the concurrent filing of respondent's motion to quash and the government's contempt application (see Pet. App. 2a, 44a). Plainly it would be arbitrary for collateral estoppel purposes for anything to turn upon the fact that one party or the other won the race to the courthouse to initiate adversary proceedings. See Resp. Br. 24 n.22. Of course, the government first sought the assistance of judicial process in each case by securing search warrants when respondent refused entry to the designated contractor-representatives, and the government "triggered" the entire dispute when it undertook oversight inspections of respondent's facilities. But even if these actions could be regarded as the functional equivalent of initiation of litigation, they do not entail harassment through redundant litigation such as collateral estoppel is intended to restrain. As we have already explained, this case results from even-handed application of the law to all persons similarly situated, rather than from any design to relitigate. Cf. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). Indeed, only by affording respondent special treatment, unavailable to

those in a comparable position, could the government have avoided the claim of relitigation. Accordingly, whatever label may be applied to the preclusion doctrine as applied in this case, the policies that underlie the doctrine have no application here.

c. Petitioner also urges (Br. 25-28) that the identity of parties in this case and *Stauffer I* requires preclusion. Petitioner largely ignores our arguments on this score (U.S. Br. 27-31). One point should be emphasized, however. In this instance, respondent does not hesitate to follow its argument to its logical conclusion, urging (Br. 32) that the government should have sought certiorari in *Stauffer I* at the time of the court of appeals' decision in that case, notwithstanding the fact that the case did not then meet the conventional criteria for review in this Court, and that other cases certain to affect the justification for further review were at that moment pending before the Ninth and Sixth Circuits. Respondent does not, however, indicate whether this Court should be expected to alter its traditional criteria for certiorari to accommodate review in these circumstances, or, if not, what effect then would be given to the denial of certiorari that would in all likelihood have resulted (see U.S. Br. 25 n.13). The expansive application of collateral estoppel respondent advocates has the potential considerably to disrupt this Court's certiorari practices.

d. Respondent claims that the decision of the court of appeals is consistent with the thrust of appellate case law. (Br. 23-24, 27-28). We disagree. With one exception, the cases upon which respondent relies simply reflect no consideration of the unique dynamics of government litigation that require limitation of issue preclusion. The exception is *American Medical International, Inc.* v. *Secretary of HEW*, 677 F.2d 118, 121-124 (D.C. Cir. 1981), which holds that estoppel is *not* to be applied so as to preclude litigation of recurring questions of public law. As respondent notes (Br. 27), the court declined to extend that reasoning to litigation between the parties to a prior action concerning the issue previously decided ad-

versely to the government. 677 F.2d at 124 & n.46. But the court did not apply estoppel against the government in favor of the particular party that had previously litigated the recurring issue because to do so would have required unequal treatment of similarly situated parties. Contrary to respondent's claim (Br. 27 n.25), the reasoning supporting that disposition was not limited to parties that are subsidiaries of a single corporate entity. Rather, the court's reasoning was unqualified (677 F.2d at 124, quoting Restatement (Second) of Judgments § 68.1, at 33 (Tent. Draft No. 4, 1977)[8]):

> The consensus of the legal profession is that "[r]efusal of preclusion is ordinary justified if the effect of applying preclusion is to give one person a favored position in current administration of the law."

The District of Columbia Circuit emphasized that "[c]ollateral estoppel 'is not meant to create vested rights in decisions . . . thereby causing inequities among [similarly situated parties].'" 677 F.2d at 124, quoting *Commissioner* v. *Sunnen*, 337 U.S. 591, 599 (1948). Thus, the only case cited that directly addresses the arguments raised here rejects respondent's position.[9]

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[8] Presently Restatement (Second) of Judgments § 28 comment c at 278 (1982).

[9] Other cases cited by respondent, even if correctly decided, are also distinguishable in other respects. *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), entailed a fact-bound question that had no application to other parties: the interpretation of a particular state-issued pollutant discharge permit. *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), also involved a fact-bound question: the economic feasibility of particular noise reduction devices for a particular class of manufacturing equipment. 603 F.2d at 594-595. Moreover, because the ensuing cases all arose in the same forum as the initial one, the Occupational Safety and Health Review Commission, many of the considerations relevant here had no application. Finally, the result in *Continental Can* appears to rest upon a "pattern of harassment of a particular employer." *True Drilling Co.* v. *Donovan*, 703 F.2d 1087, 1092 (9th Cir. 1983). *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979),

II

Respondent's arguments on the underlying question of statutory interpretation generally recapitulate the court of appeals' analysis and thus are addressed in our opening brief. Several points raised, however, warrant additional comment.

1a. Respondent seriously distorts the question presented for decision, by suggesting that this case concerns the "power [of] private contractors to force entry" into private premises (Br. 48) or to obtain search warrants and execute them (Br. 45-47). The issue decided by the court of appeals and the one we have presented for review in this Court is whether a formally designated contractor-representative of the EPA Administrator may qualify as the "authorized representative" of the Administrator for purposes of Section 114(a)(2) of the Clean Air Act, that is, to enter the premises of an operator of an air pollution source for the purpose of "sampl[ing] any [regulated] emissions." This question is purely one of statutory interpretation, and concerns only the identity of the persons who may carry out monitoring and inspection tasks of a technical nature.

Our submission is that the language and legislative history of the statute allow for the use of such contractor-representatives. By contrast, questions as to who may go into court to seek a warrant to enforce the right of inspection conferred by Section 114(a)(2) when admission has been denied to a properly authorized agent of the

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appears to rest on the court's perception that the successive cases presented a fact-bound question, arose out of related and indistinguishable transactions, and entailed deliberate relitigation of the kind condemned in *Montana*. 602 F.2d at 1343-1348. (We believe that *Starker* gives improper weight to an unappealed district court decision in a case involving a different party, and mischaracterizes the relationship between the successive cases considered.) *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982), may be said to conflict with the position we urge here. But that decision, like the others upon which respondent relies, reflects no consideration of the arguments advanced here.

EPA Administrator, and who may execute such a warrant by presenting it to the operator of a source subject to inspection, are not addressed by Section 114(a)(2) or by any other provision of the Clean Air Act. Indeed, Section 114(a)(2) makes no mention at all of any warrant requirement for inspection. Cf. *Marshall* v. *Barlow's, Inc.*, 436 U.S. at 317 n.12. Rather, these questions, which are not part of this case, are governed by general considerations of reasonableness embodied in the Fourth Amendment.[10]

EPA has never claimed that contractor-representatives are authorized to secure warrants to enforce the statutory right of entry. Such a procedure would be contrary to traditional practices respecting issuance of warrants, and might well be deemed unreasonable; such a procedure was not employed in this case (see Pet. App. 7a, 44a) or in *Stauffer I*. See 14 Env't Rep. Cas. at 1738-1739. Similarly, EPA does not claim that a warrant authorizing entry may be executed by a contractor-representative; although we do claim that such a representative may accompany the executing official. But once entry pursuant to a warrant has properly been gained, Section 114(a)(2) provides that the "authorized representative" of the EPA administrator may conduct inspections and monitoring; nothing in the statute limits the technical aspect of the inspection to full-time EPA employees.

In this case, of course, no conceivable question arises as to the manner of formal execution of the warrant, for the warrant explicitly prescribed that the right of entry was to be afforded to "EPA, through its duly authorized full-time employees, and accompanying, authorized representatives under contract with EPA, * * * for the purpose of conducting an inspection, sampling, and monitoring pursuant to Section 114 of the Clean Air Act" (Pet. App.

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[10] See also 18 U.S.C. 3105, which authorizes private persons to assist government officials in executing a search warrant. See *United States* v. *Clouston*, 623 F.2d 485, 486-487 (6th Cir. 1980) (telephone company employees' technical assistance to federal agents in executing search warrant held proper).

45a n.1). Moreover, when respondent actually denied entry to the agency's designated contractor-representative, the representative was accompanied by an EPA official (Pet. App. 7a). Thus respondent's claim that this case entails consideration of the reasonableness of procedures employed to secure or execute search warrants is spurious. Because these aspects of any entry are controlled by a body of law distinct from Section 114(a)(2)—including the reasonableness requirements of the Fourth Amendment as applied in the routine administrative search context—there is no basis for reading traditional limitations regarding search warrants into Section 114(a)(2)'s explicit grant of authority to carry out technical monitoring.

b. While the common law tradition respecting execution of warrants rehearsed by respondent (Br. 45-47) may have some bearing upon the assessment of the reasonableness of the manner of execution of a warrant (but see page 12 note 10, *supra*), respondent has adduced no evidence that this factor influenced Congress in formulating the inspection provisions of the Clean Air Act. Moreover, there is no basis for respondent's assertion (Br. 47) that Congress would have explicitly sanctioned use of contractor-representatives had it approved their use, for contractor participation in emissions monitoring bears no resemblance to private assistance in an ordinary search. The most telling indication that Congress made no connection between emissions monitoring and conventional searches, of course, is that there is no explicit provision for issuance of search warrants (or for dispensing with them) in Section 114(a)(2). In addition, the duties assigned to contractor-representatives are exclusively those requiring technical expertise. They do not entail exploratory rummaging such as might trigger the special privacy concerns associated with searches for evidence of crime. Rather, Section 114(a)(2) itself carefully limits the scope of any inspection to examination of particular records and monitoring equipment that a plant

operator is required to maintain for purposes of the Clean Air Act, and sampling of regulated emissions.

c. There is no reason to ignore Congress's express determination that inspection and monitoring of regulated emissions may be undertaken by any "authorized representative" of the Administrator. It is entirely irrelevant that another federal agency that is authorized to employ "authorized representatives" to undertake inspections of one kind or another allegedly does not employ designated contractor representatives (see Resp. Br. 47-48). The practices of agencies other than EPA are outside the record of this case, may rest on statutory language or legislative history pertinent to those agencies' work that is not germane here, and, in any event, reflect no legal conclusion about the scope of those agencies' authority. Indeed, it is most likely that diverse agency practices simply reflect the special needs arising from the particular statutory responsibilities of the various agencies. For instance, while mine safety inspectors undoubtedly require in depth technical knowledge, neither they nor any other agencies are likely to require the breadth of specialized knowledge required of EPA's representatives engaged in air pollution monitoring (see U.S. Br. 45-46).[11]

2. Respondent continues to rely upon the provisions of other statutes to attribute to Congress the intent to restrict inspections under Section 114(a)(2), even though there is no evidence that Congress was influenced by the considerations respondent hypothesizes. For instance, respondent adduces no direct evidence that Congress

[11] Respondent emphasizes (Br. 48 n.57) the absence from statutory grants of inspection authority to other agencies, of language comparable to the broad grant of authority to "authorized representatives" found in Section 114(a)(2). But the inference properly to be drawn, we submit, is simply that Congress knows how to limit inspection authority to government employees when it wishes to do so, and that each statute should be interpreted in conformity with its language.

tailored the inspection provisions of the Clean Air Act in response to concerns about the adequacy of confidentiality protections covering government contractors. Instead, respondent points (Br. 49) to the 1980 Solid Waste Disposal Act Amendments that imposed criminal penalties upon persons (such as government contractors) that are not subject to the Trade Secrets Act, 18 U.S.C. 1905.[12] But even if it could be inferred that this change was prompted by a simultaneous amendment intended to make clear that the EPA administrator's inspection authority under the Solid Waste Act extends to contractors (see U.S. Br. 43-44), it would not follow that the absence of a similar provision from the Clean Air Act reflects Congress's intention to preclude use of contractors under that Act.

First, respondent cannot gainsay the fact that Section 114(a)(2) employs precisely the language ("representative" of the EPA Administrator) that is employed in the Solid Waste Act inspection provisions to include contractor representatives among those authorized to conduct inspections. Second, it is clear beyond cavil that Congress did not deem it necessary to provide for criminal liability for contractor-representatives in every situation in which disclosure of confidential information to such persons was authorized. For instance, Congress provided criminal penalties under the Solid Waste Disposal Act for improper disclosure of confidential information by "representatives" by amending the public availability provisions of that Act, 42 U.S.C. (Supp. V) 6927(b)(1) and (2), which authorize disclosures even of confidential information to "other officers, employees, or authorized representatives of the United States." The public availability provisions of the Clean Air Act, Section 114(c), 42 U.S.C. (Supp. V) 7414(c), however, are identical to those

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[12] Although respondent cites 42 U.S.C. (Supp. V) 6921(b)(3)(B)(ii)(II), the directly pertinent provision is evidently 42 U.S.C. (Supp. V) 6927(b)(2).

of the Solid Waste Act, in all relevant respects, except for the absence of any special criminal penalty provisions for improper disclosures by persons not subject to the Trade Secrets Act (see U.S. Br. 34-35).

Thus, although Congress plainly knew that Section 114(c) (like 42 U.S.C. (Supp. V) 6927(a) and (b)(1)) authorizes disclosures to designated contractor-representatives performing duties under the Act, it has not seen fit to impose a similar regime of criminal penalties.[13]

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[13] Respondent continues to argue (Br. 39-42) that Section 114(c) of the Clean Air Act does not shed any light upon the proper construction of Section 114(a)(2). But as the court has recently reiterated, "a word is presumed to have the same meaning in all subsections of the same statute." *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 9. Thus the term "representative" in Section 114(a)(2), as in Section 114(c), presumptively includes persons other than employees and officers.

It is irrelevant for this purpose, moreover, that Section 114(c) embraces "authorized representatives of the United States" rather than only "authorized representative[s]" of the EPA Administrator. While the former term may be broader than the latter, the difference is not germane here, for the contractor-representatives at issue are authorized representatives of the Administrator. And the difference between the two provisions does not in any way negate the fact that "authorized representatives" (of the United States) under Section 114(c) includes persons other than "officers [or] employees" (of the United States). Thus respondent's suggestion (Br. 40) that the broad formulation of Section 114(c) was designed to encompass *employees* of federal agencies other than EPA simply misses the mark (see U.S. Br. 35 n.21). Respondent now suggests (Br. 40) that "authorized representatives of the United States" may also include certain state officials. But if "authorized representatives" need not be employees of the United States, and may be state officials, who are the agents in fact of the Administrator, but who are not subject to the Trade Secrets Act, there is no statutory basis for excluding duly designated contractor-representatives either. We note that the court of appeals did not embrace respondent's limiting construction of Section 114(c) (see Pet. App. 21a-22a).

Contrary to respondent's speculation (Br. 49-50) then, Congress's action in amending the Solid Waste Disposal Act in 1980 does not reflect a conclusion that the available safeguards against improper contractor disclosure (see U.S. Br. 46-47) are necessarily inadequate. Accordingly, the mere absence from Section 114(a)(2) of criminal penalties for unauthorized disclosure by contractor-representatives cannot support the artificial constriction of that grant of authority for which respondent argues. Respondent's argument that additional sanctions are needed for any contractor breaches of confidentiality should be directed to Congress.

3. Respondent appears to suggest (Br. 44 n.48) that EPA lacks statutory authority to retain contractor-representatives for purposes of Section 114(a)(2) of the Clean Air Act. But the authority of the Executive Branch to contract for services needed to fulfill statutory responsibilities is an inherent attribute of the sovereignty of the United States. *United States* v. *Tingey*, 30 U.S. (5 Pet.) 114, 127 (1831). See also 5 U.S.C. 3109(b);[14] 41 U.S.C. (Supp. V) 401, 503 and 506. Plainly, EPA's expenditure of agency funds for contractor-representatives is authorized by Congress. See, *e.g.*, *Second Supplemental Appropriations for Fiscal Year 1971: Hearings on H.R. 8190 Before the Senate Comm. on Appropriations*, 92d Cong., 1st Sess. 1625-1626 (1971).[15]

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[14] Section 3109(b) provides authority to the head of any federal agency to "procure by contract the temporary * * * or intermittent services of experts or consultants or an organization thereof," subject only to the condition that the expenditures be "authorized by an appropriation." It does not, as respondent asserts, require separate authorizing legislation for the use of a consultant or expert.

[15] Respondent's reliance (Br. 44 n.48) on OMB Circular No. A-76 is misplaced. First, there is no evidence that Congress had that document in mind when it framed Section 114(a)(2). Moreover, EPA contractor-representatives perform only technical tasks and do not engage in "regulation" or other "inherently governmental" functions. We note that respondent's approach to Section 114(a)(2) conflicts with its approach to Section 114(d). Respondent derides (Br. 39 n.38) our suggestion (U.S. Br. 36-37) that the Executive

4. We have already discussed (U.S. Br. 39-42) respondent's contention (Br. 33-36) that the legislative history of the Clean Air Act discloses Congress's intention to restrict the term "authorized representative" employed in Section 114(a)(2) to employees of the EPA. We have contrasted (Br. 41) the automobile plant inspection provisions of the Clean Air Act §§ 206(c) and 208, 42 U.S.C. (Supp. V) 7525(c) and 7542, which limit inspection authority to agency employees, with Section 114(a)(2), the stationary source inspection provision, which uses the more inclusive term, "the Administrator or his authorized representative." Suggesting that the difference in language is to be disregarded (Br. 35 & n.34), respondent asserts that the Conference Report on the 1970 Clean Air Act Amendments indicates that the House and Senate versions of the auto plant inspection provisions, which differed in the same respect, nonetheless were "essentially the same." But the passage upon which respondent evidently relies describes not the automobile plant inspection provisions of the two bills, but the provisions governing prototype and production line testing.[16] The only reference to the auto plant inspection provisions in the Con-

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Branch might responsibly exercise its authority to act through Section 114(d), yet is quick to assume that in framing Section 114(a)(2) Congress knew of, and relied upon, the OMB Circular No. A-76, which reflects such Executive self-restraint. We note also that OMB Circular No. A-76 has recently been reviewed to require governmental agencies to consider whether functions that are not essentially governmental in nature could more efficiently be performed by the private sector pursuant to federal contracts than by full time governmental employees. See 48 Fed. Reg. 37110 (1983).

[16] The passage in question states:

> The provisions of the House Bill, and the Senate Amendment revising the procedure under existing law *for prototype testing and authorizing production line testing of new vehicles and engines were essentially the same*, except that the Senate Amendment requires compliance testing of each vehicle prior to delivery.

Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970*, at 200

ference Report simply tracks the statutory language chosen without making any comment on the differing language of the underlying bills.[17] Thus, the Conference Report does not equate "authorized representatives" with "officers and employees."

Respondent also points (Br. 35-36) to three unrelated, unenacted, provisions of the Senate's version of the 1970 Clean Air Amendments that employ the term authorized representative in contexts that suggest that agency employees were contemplated. Obviously, when the statutory context requires such a limiting construction—as where "authorized representative" is employed interchangeably with "officer or employees," or an "authorized representative" is characterized as located "in" an agency "field office" for a particular region—a statute should be interpreted accordingly. But respondent can point to no such limiting language in Section 114(a)(2). Moreover, Section 114(c) of the Clean Air Act as enacted is a telling indication that Congress did not regard the term "authorized representative" as synonymous with "officer or employee." See page 16 note 13, *supra*. Respondent also continues to ignore the role of Executive prudence in determining when a function may appropriately be performed by personnel retained under contract. See pages 17-18 note 15, *supra*.

5. Our reasons for rejecting respondent's reliance (Br. 36-38) upon the legislative history of subsequently enacted provisions of the Clean Water Act have already been stated (U.S. Br. 42-43). We have noted the unreliability of post-enactment legislative history generally, and offered as an illustration the characterization of Section 114 of the Clean Air Act in the Senate report on a

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(Comm. Print. 1974) (*Leg. Hist.*). Thus the Conference Report language was directed at the present Section 206(a) and (b) (42 U.S.C. (Supp. V) 7525(a) and (b)) rather than the inspection provision, Section 206(c) (42 U.S.C. (Supp. V) 7525(c)).

[17] "The Administrator's employees may conduct plant inspections or inspect records upon presentation of appropriate credentials." *Leg. Hist.* 201.

"Superfund" bill, which is diametrically opposed to the characterization of the same provision found in the Senate Report on the 1972 Clean Water Act upon which respondent relies. Respondent replies (Br. 38 n.37) that the Senate version of the Superfund bill was not enacted, and that a single Senator subsequently wrote to the Administrator disavowing the view expressed in the report in question. We note, preliminarily, that such expressions of individual views—even when directed to pending legislation and stated publicly before the Congress—are entitled to little weight. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 & n.13 (1980). *A fortiori*, in the circumstances here, Senator Simpson's letter cannot be taken as a reflection of Congress's intent in enacting Section 114(a)(2) of the Clean Air Act.[18] More to the point, however, respondent's reply is misdirected, for it is not our contention that the 1980 Senate Report should be regarded as authoritative evidence of the meaning of Section 114(a)(2). Rather, we invoke the 1980 report simply to underscore that after-the-fact legislative history of separate legislation such as that which respondent relies upon does not afford any reliable basis for limiting the plain language of Section 114(a)(2). Senator Simpson's letter surely does not detract from our point.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1983

[18] Respondent's further claim (Br. 38 n.37) that provisions of the enacted Superfund Act are not modeled after the Clean Air Act is an irrelevancy. The pertinent passage in the Senate report on the forerunner bill (U.S. Br. 42-43) is a characterization of the Clean Air Act inspection provision, not merely a description of the proposed Superfund bill.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 424309 123

No. 82-1448-CFX
Status: GRANTED

Title: United States, Petitioner
v.
Stauffer Chemical Company

Docketed:
February 28, 1983

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Lettow, Charles F.

Entry	Date	Note	Proceedings and Orders
1	Dec 27 1982		Application for extension of time to file petition and order granting same until February 27, 1983 (O'Connor, January 3, 1983).
2	Feb 28 1983	G	Petition for writ of certiorari filed.
3	Mar 23 1983		Brief of respondent Stauffer Chemical Co. in opposition filed.
4	Mar 30 1983		DISTRIBUTED. April 15, 1983
5	Apr 18 1983		Petition GRANTED.
			**********
6	Apr 23 1983		Record filed.
7	Apr 23 1983		Certified C. A. proceedings received.
8	Apr 26 1983	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Apr 27 1983		DISTRIBUTED. May 12, 1983. (Above motion.)
10	May 16 1983		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
12	May 31 1983		Order extending time to file brief of petitioner on the merits until July 2, 1983.
13	Jul 1 1983		Brief of petitioner filed.
15	Jul 18 1983		Order extending time to file brief of respondent on the merits until August 15, 1983.
16	Aug 12 1983		Brief of respondent Stauffer Chemical Co. filed.
17	Aug 16 1983		CIRCULATED.
18	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 2, 1983. (2nd case) (1 hour)
19	Oct 25 1983	X	Reply brief of petitioner United States filed.
20	Nov 2 1983		ARGUED.